Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

MICHAEL CASEY, *et al.*,

Petitioners,

v.

NORTH AMERICAN SAVINGS, F.S.B., *et al.*,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Missouri statutory and common law prohibits anyone other than a lawyer licensed to practice law in Missouri from charging others a fee for the preparation of documents affecting legal rights in the state. The respondents, three federal savings associations, none of which are licensed to practice law in Missouri, charged their Missouri borrowers fees for the preparation of mortgage loan documents.

The question presented is: Does 12 CFR § 560.2, which preempts all state laws "purporting to regulate or otherwise affect [the] credit activities" of federal savings associations, preempt any application to federal savings associations of Missouri's prohibition against charging document preparation fees, where the prohibition is part of the state's law regulating the practice of law?

In analyzing the question presented, the Court should note: (1) the prohibition is part of the state's general contract, commercial, and tort law; (2) the prohibition applies to all persons and not just lenders; (3) the law establishing the prohibition is silent on the credit activities of lenders; (4) the law was not enacted to surreptitiously regulate or affect the credit activities of lenders; and (5) although the law affects the credit activities of federal savings associations, it does so only incidentally to the law's purpose of regulating the practice of law.

LIST OF PARTIES

Petitioners Michael Casey, Richard Keller, Kathleen Keller, Julie Pennington, Richard Piatchek, and Heidi Piatchek (jointly, "Borrowers") are homeowners residing in St. Louis County, Missouri. Borrowers were plaintiffs below.

Respondents North American Savings, F.S.B., Heartland Bank, and ABN AMRO (jointly, "Lenders") are federal savings associations that made loans to Borrowers to finance the purchase of Borrowers' respective homes.

Michael Crider was another plaintiff in state court. His loan was from North American Mortgage Company ("NAMCO"), a federal savings association subsequently acquired by Washington Mutual Bank ("WaMu"). NAMCO was a defendant; WaMu was never a party below. While the state-court judgment was on appeal, WaMu went into receivership. The FDIC, as receiver, removed the case to the district court under 12 U.S.C. § 1819(b)(2)(B). Following removal, Crider moved to dismiss his appeal against the FDIC. The United States Court of Appeals for the Eighth Circuit granted Crider's motion to dismiss his appeal, and neither Crider nor the FDIC are parties here.

CORPORATE DISCLOSURE STATEMENT

Petitioners are individuals.

North American Savings, F.S.B., is a subsidiary of NASB Financial, Inc., a publicly-held company that owns more than 10% of its stock.

Heartland Bank is a subsidiary of Love Savings Holding Company. No publicly-held company owns 10% or more of the stock of Heartland Bank or its parent.

ABN AMRO has been merged into Citimortgage, Inc. Its ultimate parent is Citigroup, Inc., a publicly-held company that beneficially owns more than 10% of ABN AMRO's stock.

As a result of past transactions, Bank of America Corporation, through various subsidiaries, retains an interest in ABN AMRO with respect to this litigation.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported as *Casey v. FDIC*, 583 F.3d 586 (8th Cir. 2009). [*Appendix* at A-1].

The district court decision is unreported, but is available online as *Casey v. Accel Mortgage Services, Inc.*, 2008 U.S. Dist. Lexis 104859 (E.D. Mo., Dec. 30, 2008). [A-19].

The case was removed from the Missouri state courts to the district court by the FDIC while pending on appeal. Pursuant to Eighth Circuit precedent, the district court adopted the orders and judgment of the state trial court as its own. The relevant state court order [A-24] is unreported and is not available online.

The state-court case originally involved more parties than appear here. After entry of the relevant state court order, claims against five of the remaining defendants were split into separate cases. [A-38]. Two of those cases were tried, while the three others settled. The Missouri Supreme Court ultimately decided appeals in the two cases that were tried. Its decisions are published as *Eisel v. Midwest BankCentre*, 230 S.W.3d 335 (Mo. banc 2007) [A-36], and *Carpenter v. Countrywide Home Loans, Inc.*, 250 S.W.3d 697 (Mo. banc 2008) [A-45].

STATEMENT OF JURISDICTION

The district court had jurisdiction under 12 U.S.C. § 1819(b)(2)(B), which gives the FDIC as receiver the authority to remove to federal court any state-court case in which the FDIC becomes a party, so long as it does so within 90 days of being substituted as a party in the case. The FDIC was substituted in the state-court appeal October 31, 2008. The FDIC removed the appeal to the district court November 6, 2008, less than 90 days after its substitution.

The Court of Appeals had jurisdiction under 28 U.S.C. § 1291, which gives the Courts of Appeals jurisdiction from all final decisions of the district courts.

This Court has jurisdiction under 28 U.S.C. § 1254.

STATEMENT OF THE CASE

I. Background.

Some mortgage lenders doing business in Missouri, including Lenders herein, engaged in the practice of charging their Missouri customers for the preparation of legal documents, including promissory notes and deeds of trust, used by the Lenders to effect residential mortgage loans to those customers, even though the documents had not been prepared by lawyers licensed to practice law in Missouri.

This practice of charging document preparation fees for non-lawyer-prepared legal documents was not

limited to Lenders and other federal savings associations, but was also practiced by some state-chartered banks and U.S. banks doing business in Missouri. In addition, some persons engaged in non-banking businesses in Missouri, such as automobile dealers, recreational vehicle dealers, real estate brokers, and escrow companies, among others, have from time to time charged their customers document preparation fees, even though the documents for which such fees were charged were not prepared by Missouri-licensed lawyers.

In Missouri, the charging of a separate fee for the preparation of legal documents is part of the law business, and only lawyers licensed to practice in Missouri are lawfully allowed to charge document preparation fees for documents affecting legal rights in Missouri.

Missouri courts have consistently held — with one exception discussed below — that *anyone* who is not a Missouri lawyer who charges a document preparation fee is liable to pay a refund to the person charged. A statute passed by the Missouri General Assembly to help implement this law provides that a person charged an improper document preparation fee who sues for a refund within two years of paying the fee shall recover treble damages. If the person does not bring suit within the two-year period, the Missouri Attorney General may sue for the treble damages. Section

484.020.2, Revised Statutes of Missouri ("RSMo."). In addition, if a person charged an improper document preparation fee does not sue within the two years provided by statute, he or she can still sue for a refund of the fee under the equitable common-law doctrine of money had and received. *Carpenter*, 250 S.W.3d at 703. [A-56].

The present case is the only known exception to the unbroken string of Missouri cases enforcing Missouri's prohibition on non-lawyers charging document preparation fees. Here, the state trial judge held that Lenders and other federal savings associations were not bound by Missouri's restrictions on the charging of document preparation fees because the Missouri unauthorized practice of law statute was preempted by federal regulation, namely 12 CFR § 560.2. The state trial judge held:

> Under 12 C.F.R. 560.2(a), the Director, by regulation has elected to occupy the field except for limited areas covered by (c) of the regulations, none of which appear to be relevant to this proceeding. Federal regulations such as 12 CFR 560.2(a) have the same effect as federal statutes. Regulation of fees related to financial transactions is within the clear intent of the regulations preempted. Therefore, this field has been preempted by federal law

> and Plaintiff fails to state a cause of action against those Defendants.

[A-33 (citation omitted)].

The Court of Appeals for the Eighth Circuit affirmed the judgment finding federal preemption. Although the Court of Appeals acknowledged that, "Neither statute[1] purports on its face to impose requirements on lending," the Court of Appeals nevertheless held that the statutes, "as applied," impose requirements on Lenders' credit activities, and are therefore preempted under Section 560.2(b). *Casey*, 583 F.3d at 595, 596. [A-16, A-18].

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[1] The second statute referenced in the Court of Appeals' opinion is the Missouri Merchandising Practices Act, Sections 407.010, *et seq.*, R.S.Mo. (the "MPA"), which prohibits fraudulent conduct in commerce. A violation of Section 484.020.2 with respect to charging document preparation fees also violates the MPA. *Zmuda v. Chesterfield Valley Power Sports, Inc.*, 267 S.W.3d 712, 716 (Mo. App. 2008).

The prohibition on non-lawyers charging a document preparation fee is also part of Missouri's common law, as is the right to recover any fees paid to a non-lawyer. The Court of Appeals misreads Missouri law in concluding that the common-law right of recovery was contingent upon a violation of the statute. *See Casey*, 583 F.3d at 595 n.3 [A-16], and compare with *Carpenter*, 250 S.W.3d at 703 [A-56].

II. The federal regulation at issue in the case: 12 CFR § 560.2.

12 CFR § 560.2 was enacted by the Office of Thrift Supervision ("OTS") by authority granted by Congress through the Home Owners' Loan Act, 12 U.S.C. §§ 1461-68 ("HOLA").

Section 560.2 states in relevant part:

> § 560.2 Applicability of law.
>
> (a) Occupation of field.... OTS hereby occupies the entire field of lending regulation for federal savings associations. OTS intends to give federal savings associations maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme of regulation. Accordingly, federal savings associations may extend credit as authorized under federal law, including this part, without regard to state laws *purporting to regulate or otherwise affect their credit activities*, except to the extent provided in paragraph (c) of this section or § 560.110 of this part. For purposes of this section, "state law" includes any state statute, regulation, ruling, order or judicial decision.

> (b) Illustrative examples. Except as provided in § 560.110 of this part, the types of state laws preempted by paragraph (a) of this section include, without limitation, *state laws purporting to impose requirements regarding*: ...
>
> (5) Loan-related fees, including without limitation, initial charges, late charges, prepayment penalties, servicing fees, and overlimit fees;...
>
> (c) State laws that are not preempted. *State laws of the following types are not preempted to the extent that they only incidentally affect the lending operations of Federal savings associations* or are otherwise consistent with the purposes of paragraph (a) of this section:
>
> (1) Contract and commercial law; ...
>
> (4) Tort law; ...

12 CFR § 560.2 (emphasis added).

As discussed in detail below, the crux of the Court of Appeals' error was its misinterpretation of the regulatory phrases, "state laws purporting to regulate or otherwise affect their credit activities" and "state laws purporting to impose requirements regarding: ... Loan-related fees."

In short, the Court of Appeals effectively ignored the words "purporting to" in each phrase in reaching its conclusion that the preemptive effect of the regulation reached even state laws which did not *purport* to regulate (or otherwise affect or impose requirements upon) credit activities, but which only had *an affect* upon those activities "as applied." *See Casey*, 583 F.3d at 595 [A-16].

In other words, the Court of Appeals' interpretation effectively reads out of the regulation a separate subsection that specifies when state laws that affect credit activities are preempted even though they do not purport to regulate those activities.

III. The OTS's final rule issuance and the interpretive guidelines stated therein.

In its final rule issuance for the regulations including 12 CFR § 560.2, the OTS explained the scope of the federal preemption it intended in issuing the regulations. The OTS in that issuance: (a) expressed its intention that the regulation not preempt basic state laws that have only an incidental affect on lending; and (b) explained the sequence to be followed in applying the regulation to determine whether a particular state law was preempted. 61 Fed. Reg. 50,951, 50,966-67 (1996). Although the text of the final rule issuance is lengthy, it is useful to quote the applicable portions in full to properly understand the OTS's intentions with regard to Section 560.2:

Paragraph (c) describes certain types of state laws that OTS does not intend to preempt....

OTS believes that paragraph (c) should be retained in order to provide guidance regarding the scope of preemption intended by paragraph (a). *OTS wants to make clear that it does not intend to preempt basic state laws such as state uniform commercial codes and state laws governing real property, contracts, torts, and crimes.* To reduce the potential for misunderstanding, however, we have made several changes to paragraph (c). First, we have modified the regulatory language that precedes the list of state laws that are not preempted. The introductory language now indicates that laws falling in these areas are not preempted to the extent that they either: (i) have only an incidental impact on lending; or (ii) are otherwise not contrary to the purposes expressed in paragraph (a) of the regulation....

Adding this two-part test to the regulation will provide an interpretive standard for identifying state laws that may be designed to look like traditional property,

contract, tort, or commercial laws, but in reality are aimed at other objectives, such as regulating the relationship between lenders and borrowers, protecting the safety and soundness of lenders, or pursuing other state policy objectives.

When confronted with interpretive questions under § 560.2, we anticipate that courts will, in accordance with well established principles of regulatory construction, look to the regulatory history of § 560.2 for guidance. *In this regard, OTS wishes to make clear that the purpose of paragraph (c) is to preserve the traditional infrastructure of basic state laws that undergird commercial transactions, not to open the door to state regulation of lending by federal savings associations.* When analyzing the status of state laws under § 560.2, the first step will be to determine whether the type of law in question is listed in paragraph (b). If so, the analysis will end there; the law is preempted. *If the law is not covered by paragraph (b), the next question is whether the law affects lending.* If it does, then, in accordance with paragraph (a), the presumption arises that the law is preempted. This presumption can be reversed only if

> the law can clearly be shown to fit within the confines of paragraph (c). For these purposes, paragraph (c) is intended to be interpreted narrowly. Any doubt should be resolved in favor of preemption

61 Fed. Reg. at 50,966-67 (emphasis added).

IV. Missouri's regulation of the practice of law within the state includes a ban on non-lawyers charging fees for the preparation of legal documents.

Missouri, like the other States, defines and regulates the practice of law within its borders. Under Missouri law, the power to define and regulate the practice of law is the sole province of the Missouri Supreme Court, although the Missouri General Assembly may assist the Supreme Court in its efforts. *Eisel*, 230 S.W.3d at 338-39. [A-41-42].

Missouri defines the "law business" as including "the drawing or the procuring of or assisting in the drawing for a valuable consideration of any paper, document or instrument affecting or relating to secular rights..." Section 484.010.2, RSMo.

The Missouri General Assembly provided assistance in enforcing the law against the unauthorized practice of law by, among other actions, enacting Section 484.020, RSMo., which imposes penalties, including misdemeanor criminal liability and civil treble

damages, on non-lawyers who violate Missouri's restrictions on the unauthorized practice of law.

Section 484.020 states in relevant part:

> Any person, association, partnership, limited liability company or corporation who shall violate the foregoing prohibition of this section shall be guilty of a misdemeanor ... and shall be subject to be sued for treble the amount which shall have been paid him or it for any service rendered in violation hereof by the person ... paying the same within two years from the date the same shall have been paid...

Section 484.020.2, RSMo.

The prohibition discussed above is not aimed solely at the Lenders or, indeed, specifically at lenders of any type. It is a general rule of law aimed at all who would charge or increase a fee for services when the services involve non-lawyers performing legal work within Missouri or affecting Missouri property or other legal rights. *See Eisel*, 230 S.W.3d at 339. [A-41-43].

For example:

The Missouri Supreme Court prohibits **real estate brokers** from charging a separate, additional fee for the preparation of documents affecting property rights. *Hulse v. Criger*, 247 S.W.2d 855, 863 (Mo. banc 1952).

The Missouri Supreme Court prohibits **escrow companies** from either charging a separate fee for document preparation or varying their customary fees for closing services based upon whether documents are to be prepared in the transaction. *In re First Escrow, Inc.*, 840 S.W.2d 839, 849 (Mo. banc 1992).

The Missouri Supreme Court prohibits **commercial businesses** from charging for the drawing, preparing, or assisting in the preparation of trust workbooks, trusts, wills, and powers of attorney for a Missouri resident without the direct supervision of an independent licensed attorney selected by and representing the resident. *In re Mid-America Living Trust Assocs., Inc.*, 927 S.W.2d 855, 871 (Mo. banc 1996).

The Missouri Court of Appeals has held that Missouri law prohibits **recreational vehicle dealers** from charging a separate document fee to prepare "purchase agreements, invoices, retail installment contracts, title work, financing documents, and other instruments and documents of legal significance, or that affect or relate to rights and title to property" in connection with the sale of all-terrain vehicles, motorcycles, or other recreational vehicles. *Zmuda v. Chesterfield Valley Power Sports, Inc.*, 267 S.W.3d 712 (Mo. App. 2008).

Moving to the lending arena, the Missouri Supreme Court prohibits **state-chartered banks** from charging document preparation fees in mortgage transactions to

recoup the cost of preparing standard-form documents necessary to facilitate the selling of mortgage loans on the secondary market. *Eisel*, 230 S.W.3d at 338-39. [A-41-43].

The Missouri Merchandising Practices Act ("MPA") is similarly a statute of general application. The MPA has a scope far broader than misbehaving lenders or violations of restrictions on the unauthorized engagement in the law business. It is a general part of Missouri's commercial or business tort law. *See, e.g., Finnegan v. Old Republic Title Co. of St. Louis, Inc.*, 246 S.W.3d 928, 929 (Mo. banc 2008) (MPA applies to **notaries** who charged for notarizations without recording the signatures in their notary journals as required by the notary statute); *Gibbons v. J. Nuckolls, Inc.*, 216 S.W.3d 667 (Mo. banc 2007) (MPA applies to **car wholesaler** who sold rebuilt car without disclosing that car had been in an accident, even though there was no privity of contract between the buyer and the wholesaler); *Raster v. Ameristar Casinos, Inc.*, 280 S.W.3d 120, 131 (Mo. App. 2009) (MPA applies to claim that **casino** gave misleading description of changes to rules of compensation club; "a customer placing a bet is owed a duty of fair play"); *Schuchmann v. Air Services Heating & Air Conditioning, Inc.*, 199 S.W.3d 228, 233 (Mo. App. 2006) (MPA applies to claim that an **HVAC contractor** would not honor "lifetime warranty" on new equipment installed by the contractor).

And the same is true with respect to the common-law remedy of money had and received, which applies in a large range of circumstances and not only as to claims made against Lenders or against persons who improperly charged document preparation fees. *See, e.g., Investors Title Co. v. Hammonds*, 217 S.W.3d 288, 293-94 (Mo. banc 2007) (county required to repay title company money stolen over time by employee of county recorder of deeds notwithstanding absence of an express contract between county and title company).

Thus all of the state laws involved in this case are laws of general application.

REASONS FOR GRANTING THE PETITION

There are three primary reasons for granting the petition for a Writ of Certiorari.

(1) The Court of Appeals made a substantial error in its interpretation of Section 560.2 which results in the preemption of basic state laws that neither Congress nor the OTS intended to preempt, and which effectively causes other paragraphs of Section 560.2 to be without effect.

(2) The Court of Appeals' interpretation deepens a split among the Circuits about the scope of preemption under Section 560.2.

(3) The Court of Appeals' method of interpretation, and in particular its expansion of the meaning of the word "purporting" far beyond its ordinary meaning, has significant implication for numerous other statutes and regulations that use language similar to that in Section 560.2.

An additional, although not primary, ground for granting the petition is the significant and ongoing impact the Court of Appeals' decision will have in Missouri. This impact will affect not only the parties and the members of the putative plaintiffs' classes, but also the Missouri Supreme Court in its ability to prevent the unauthorized practice of law, future mortgage borrowers who will be charged for legal work performed by non-lawyers, and U.S. banks and other lenders in competition with federal savings associations.

The financial impact of this case is also great. This case and its offshoots have resulted in judgments and settlements recovering in excess of $16 million in damages, plus attorneys' fees, for over 50,000 Missouri homeowners. Based on petitioners' prefiling investigation, the potential claims against the three Lenders here involve approximately as many potential class members, and even greater total damages than has already been recovered.

DISCUSSION

I. The Court of Appeals misinterpreted Section 560.2 by ignoring the plain meaning of the regulatory term "purporting" and adopting an "as applied" interpretation for 560.2(b).

The word "purporting", which is the disputed term appearing in the two key phrases in Section 560.2, is not specially-defined in the regulations. This Court interprets undefined terms using their ordinary meanings. *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995). And, in innumerable decisions, this Court has turned to dictionaries to find the ordinary meaning of a word.

Turning to two dictionaries, the word "purport", the root of "purporting", means:

> *tr.v.* **1.** To have or present the often false appearance of being or intending; profess. **2.** To have the intention of doing; purpose.
>
> *n.* **1.** Meaning presented, intended, or implied; import. **2.** Intention; purpose.

American Heritage College dic•tion•ary (4th ed. 2002). *See also Merriam-Webster Online*: "**1:** to have the often specious appearance of being, intending, or claiming (something implied or inferred)...; **2:** intend, purpose."

The OTS, in choosing to use the word "purporting" in writing its preemption regulation, expressed its purpose to preempt state laws that *intended* or had *the purpose of* regulating the credit activities of federal savings associations. This is the plain meaning of the regulatory language used by the OTS.

While the OTS has adopted a broad scheme of preemption in Section 560.2, it is not all encompassing. The OTS's regulatory scheme does not bar states from adopting and enforcing laws of general application that affect Lenders' credit activities, so long as (a) the laws are not intended to regulate or affect credit activities, and (b) whatever affect that the laws may have on credit activities is only incidental to the laws' primary purposes. Indeed, Justices of this Court have recognized the limitations of preemption under HOLA: "[T]he authority of [OTS's predecessor] to pre-empt state laws is not limitless ... it is clear that HOLA does not permit the Board to pre-empt the application of all state and local laws to such institutions." *Fidelity Federal Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 171 (1982) (O'Connor, J., concurring).

The Court of Appeals, however, failed to appreciate the importance, and meaning, of the term "purporting" used in Section 560.2. Instead, the Court of Appeals summarized its view of the regulatory-interpretation issue before it as follows:

> The parties contest the precise meaning of this language. The homeowners read the words "state laws purporting to impose requirements" to mean state laws that *on their face* impose requirements expressly upon lenders.[2] Thus the argument goes, a law which makes no mention of lending necessarily falls outside the scope of the § 560.2(b) examples and is preempted only if § 560.2(a) requires that result, without regard to § 560.2(b). The FSA lenders read the regulation more broadly: a state law that does not expressly mention lending is nevertheless preempted if, *as applied*, the law is one described in § 560.2(b).

Casey, 583 F.3d at 593. [A-12-13].

The Court of Appeals, relying on the decision of the Ninth Circuit in *Silvas v. E*Trade Mortgage Corp.*, 514

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[2] The Court of Appeals somewhat misstates the Borrowers' position. It is Borrowers' view that the "purporting to impose requirements" language does not cover only state laws that on their face expressly impose requirements upon lenders, but that it also covers, in the words of the OTS, "state laws that may be designed to look like traditional property, contract, tort, or commercial laws, but in reality are aimed at other objectives, such as regulating the relationship between lenders and borrowers, protecting the safety and soundness of lenders, or pursuing other state policy objectives." 61 Fed. Reg. at 50,966.

F.3d 1001 (9th Cir. 2008), adopted the Lenders' proposed "as applied" interpretation. Although the Court of Appeals acknowledged that *Silvas* "failed to explain the reason for its conclusion that an 'as applied' analysis was required," it explained that the Ninth Circuit "cited two OTS legal opinions which support its approach," and in turn cited those OTS legal opinions as support for its own conclusion. *See Casey* 583 F.3d at 594. [A-14].

The earlier of the two OTS legal opinions, a 1996 Opinion of Chief Counsel,[3] considered whether an Indiana deceptive acts and practices ("DAP") statute — a statute that essentially corresponds to the Missouri MPA — was preempted by Section 560.2. The Court of Appeals' reliance upon the 1996 opinion is odd. The 1996 opinion did not use the "as applied" analysis described by the Eighth and Ninth Circuits. Rather, the OTS determined that the Indiana statute did not "on its face" come within the scope of 560.2(b), and thus needed to be analyzed under 560.2(c). Moreover, the 1996 opinion concluded that the Indiana DAP statute was not preempted by Section 560.2. *Casey*, 583 F.3d at 594. [A-14-15].

Specifically, with respect to the Indiana DAP, the OTS's General Counsel opined in 1996 stated:

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[3] *See* http://files.ots.treas.gov//56615.pdf.

> Your final preemption inquiry involves Indiana's DAP law. State laws prohibiting deceptive acts and practices in the course of commerce are not included in the illustrative list of preempted laws in § 560.2(b). Thus, a more extensive preemption analysis of Indiana's DAP statute is required....
>
> The Indiana DAP falls within the category of traditional "contract and commercial" law under § 560.2(c)(1). While the DAP may affect lending relationships, the impact on lending appears to be only incidental to the primary purpose of the statute — the regulation of the ethical practices of all businesses engaged in commerce in Indiana. ... Accordingly, we conclude that the Indiana DAP is not preempted by federal law.

1996 Opinion at 9, 10.

Thus, both the analysis and the holding of the 1996 opinion are directly contrary to the legal principals for which the Eighth and Ninth Circuits purportedly cite it as authority.

The Eighth and Ninth Circuits' reliance on the 1999 Opinion of Chief Counsel[4] is as misplaced as their reliance on the 1996 opinion. For most of its analysis, the 1999 opinion examines whether various applications of the California Unfair Competition Act ("UCA")[5] are preempted under the balancing tests established by paragraph (a) and (c) of Section 560.2, having found that the statutes are not preempted as a whole under 560.2(b). *See 1999 Opinion* at 12-13, 14-17.

Thus, while the 1999 opinion held that *certain lawsuits* brought under the UCA are preempted[6] — for example, a suit seeking to obtain an order directing a lender how it should disclose its interest rates in advertising was held to be preempted — the UCA statute as a whole is not preempted. *1999 Opinion* at 14-15, 18. The 1999 opinion states:

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[4] *See* http://files.ots.treas.gov//56903.pdf.

[5] The California UCA is a unique statute that allows any person to bring a suit to enjoin "unfair competition" and obtain an order of restitution, even if the person is not himself injured. Moreover, the statute is broadly defined. An "unfair" business practice "is one whose harm to the victims outweigh its benefits to society," and "fraudulent" conduct is "any conduct by which the public is likely to be deceived; no actual deception, reasonable reliance, or damages are required." Moreover, the statute is one of strict liability; there is no requirement that the defendant intended to injure anyone. *1999 Opinion* at 2-3.

[6] The OTS defines state law as including any judicial decision. *See* Section 560.2(a).

> A state law that, *on its face*, purported to regulate the advertising of a federal savings association would be preempted under § 560.2(b). Accordingly, to the extent that the UCA is being used, directly or indirectly, to require a particular form of interest rate disclosure in advertising the Associations' lending programs in order to be considered "fair" or "not misleading," the UCA is preempted.

Id. at 14-15 (emphasis added). But the OTS does not contend that the UCA is preempted as a whole simply because it is being used in some cases in an attempt to regulate Lenders. To the contrary:

> We do not preempt the entire UCA or its general application to federal savings associations in a manner that only incidentally affects lending and is consistent with the objective of allowing federal savings associations to operate in accordance with uniform standards.

Id. at 18.

In short, the primary authorities on which the Court of Appeals relied to reach its decision in this case either "fail[] to explain the reason for its conclusion" (*Silvas*) or actually reach holdings 180-degrees contrary to the supposed legal rule for which the Court

of Appeals cites them (*i.e.*, the 1996 and 1999 opinions). Consequently, to the extent that the Court of Appeals purports to rely upon the OTS's interpretation of its own regulation to adopt an interpretation of that regulation contrary to the ordinary meaning of the regulatory language, the supposed OTS interpretations did not, in fact, say what the Court of Appeals thinks they said.

The Court of Appeals' decision thus severely and materially misstates the law and the applicable authorities.

II. The Court of Appeals' decision irreconcilably conflicts with the prior decision of the Court of Appeals for the Seventh Circuit.

Although the Court of Appeals denies it, its decision in this case is in absolute conflict with an earlier decision of the Court of Appeals for the Seventh Circuit interpreting and applying the same regulation. This is a conflict which ought to be addressed by the Supreme Court.

The Seventh Circuit held in *In re Ocwen Loan Servicing, LLC, Mortgage Servicing Litig.*, 491 F.3d 638 (7th Cir. 2007), that because HOLA and the OTS regulations provide no remedy to persons injured by the wrongful acts of federal savings associations, "we read subsection (c) to mean that OTS's assertion of plenary regulatory authority does not deprive persons harmed

by the wrongful acts of savings and loan associations of their basic state common-law-type remedies." *Id.* at 643.

Relying heavily on the 1996 opinion of the OTS's General Counsel — the same opinion on which the Eighth and Ninth Circuits purport to rely — the Seventh Circuit held: "Not all state statutes that might be invoked against a federal S&L are preempted, any more than all common law doctrines are; for remember that contract and commercial law are among the laws listed in subsection (c) of the regulation..." *Id.* at 646. Specifically, the Seventh Circuit held that state DAP statutes — such as the Missouri MPA — are not generally preempted by HOLA and its regulations. *Id.* at 644.

Oddly, the Court of Appeals here refuses to even recognize that its decision is in conflict with that of the Seventh Circuit or that there is a split between the Seventh and Ninth Circuits on the very issue raised in this appeal. Instead, the Court of Appeals attempts in very general terms to distinguish *Ocwen*, describing that opinion as holding that "several generally applicable state statutes were preempted by § 560.2(a) because, as applied, they fell within the § 560.2(b) illustrative examples." *Casey*, 583 F.3d at 595 n.3. [A-16]. As shown above, however, this characterization is inaccurate and ignores that *Ocwen* held DAP statutes and many other state-law remedies not preempted.

III. The Court of Appeals' decision that the "purporting to impose requirements" element established by Section 560.2(b) is satisfied by an "as applied" test effectively abrogates paragraphs (a) and (c) of the regulation, which control the preemption of state laws that "affect" a federal savings association's credit activities.

Reversal of the Court of Appeals' decision applying Section 560.2(b) to the Missouri law here does not mean that the regulation does not preempt any state law which, "on its face," does not purport to impose requirements on Lenders' credit activities. To the contrary: analysis of the application of paragraph (b) is the just the first step of a multi-step analysis under the regulation. If a state law passes muster under paragraph (b), it still must satisfy the tests stated in paragraphs (a) and (c). Paragraph (a) asks if the state law affects credit activities. If it does, then the state law is presumed to be preempted unless it is saved by paragraph (c) as a state law of general application that only incidentally affects such credit activities.

The Court of Appeals' holding, however, short-circuits the entire regulatory framework established by the OTS. Under the "as applied" analysis adopted below, if a state law, as applied, affects the Lender's credit activities, it is preempted under Section 560.2(b). But this means that no state law that affects credit

activities, whether incidentally or not, will ever be subject to the analysis stated in paragraphs (a) and (c).

Thus, the Court of Appeals' analysis effectively abrogates paragraphs (a) and (c) of Section 560.2 by eliminating any possibility that any state law will ever be subject to being tested by those paragraphs. Thus the Court of Appeals' interpretation violates the well-established rule that courts should interpret statutes and regulations so as to give effect, whenever possible, to every clause and word. *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47 (2007).

IV. The Court of Appeals' decision has implications far beyond just the preemption of state laws that have an affect on Lenders' credit activities.

The Court of Appeals' decision, if left undisturbed, will have an impact that goes well beyond just Section 560.2 and the regulation of the practice of law in Missouri. "Purporting" and various other forms of "purport" are used frequently in federal statutes and regulations, including those concerning the preemption of state law. Redefining "purporting" away from its ordinary dictionary meanings, as the Court of Appeals has done here, threatens an unintended wholesale revision of federal law, which this Court ought to nip in its bud.

Perhaps the potentially most far-reaching impact of this new interpretation will be in the area of pensions and retirement plans. The Employee Retirement Income and Security Act ("ERISA") includes a preemption provision, the scope of which is defined in reference to any state or local governmental organization "which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title." 29 U.S.C. § 1144. The Court of Appeals' decision will thus likely encourage litigants to revisit numerous previously-settled decisions with regard to the scope of laws preempted by ERISA.

In *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995), for example, this Court held that language of ERISA's preemption of state law — which would appear to be broader than that of Section 560.2, in that it includes the phrase "directly or indirectly" — does not preempt laws of general application that only incidentally affect the designated activities:

> [T]o read the pre-emption provision as displacing all state laws affecting costs and charges on the theory that they indirectly relate to ERISA plans that purchase insurance policies or HMO memberships that would cover such services would effectively read the limiting language in § 514(a) out of the statute, a conclusion

> that would violate basic principles of statutory interpretation and could not be squared with our prior pronouncement that pre-emption does not occur ... if the state law has only a tenuous, remote, or peripheral connection with covered plans, as is the case with many laws of general applicability.

514 U.S. at 661 (internal quotation omitted).

The Court of Appeals' holding here, however, invites the courts to do just what this Court has instructed should not be done: ignore the limiting language in federal preemption statutes and regulations, extending preemption to all areas, actions and entities even remotely affecting the areas defined by statute. If the "purporting to regulate" language in Section 560.2 is expanded to the wide breadth of the "as applied" standard adopted by the Court of Appeals, this broader reading would appear to be directly applicable to the ERISA provision mentioned above.

Many other federal statutes and regulations use similar "purporting to" language, and are therefore likely affected by the Court of Appeals' decision here. For example, the preemption language of regulations relating to banks' fiduciary activities (12 CFR § 550.136) and deposit activities (12 CFR § 557.11) are essentially identical to that used in Section 560.2.

Similarly, the Department of Housing and Urban Development has exercised its statutory rulemaking power with regard to certain housing projects, and in so doing has declared that "[a]ny state or local law, ordinance, or regulation is without force and effect insofar as it purports to regulate rents" for such projects. 24 CFR § 246.1. Under the Court of Appeals' decision here, any general state law which might affect the costs of owning, managing, or leasing real estate — such as laws requiring compliance with generally-enforced health and safety standards or compelling participation in trash-recycling programs—would appear to now be preempted, as the costs of complying with such generally-applicable laws would naturally have a tendency to affect the rent charged tenants.

CONCLUSION

For the reasons given above, this case presents important issues of federal law affecting the preemption of potentially numerous state laws of all types, as well as the ability of a state to regulate the practice of law within its borders. Because the decision below also deepens a split between the Circuits and essentially writes out of existence an important regulatory limitation on preemption, this case presents issues of sufficient magnitude and national importance as to merit consideration by the Supreme Court of the United States.

Respectfully submitted,

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APPENDIX

APPENDIX

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 09-1096

Michael Casey, *et al.*,
Plaintiffs–Appellants,

v.

Federal Deposit Insurance Corporation,
as receiver of Washington Mutual Bank,
Defendant,
North American Savings Bank, *et al.*,
Defendants – Appellees.

Submitted: September 24, 2009
Filed: October 20, 2009

Before MURPHY, BRIGHT, and RILEY, Circuit Judges.

MURPHY, Circuit Judge.

The plaintiffs in this case were members of a class who brought claims in Missouri state court against their mortgage lenders, alleging that the lenders had engaged in the unauthorized practice of law by charg-

ing a fee for preparation of loan documents by non-lawyers. The state court dismissed the claims against four lenders who were federal savings associations (FSAs). While an appeal of that decision was pending, the Federal Deposit Insurance Corporation (FDIC) was substituted for one of the FSA lenders and it removed the claims to federal district court. That court[1] adopted the state court's preemption decision and then transferred the appeal to this court, together with a renewed motion to remand. We affirm.

I.

Appellants are seven homeowners whose claims against FSA lenders were dismissed by the state court based on federal preemption: Michael Casey, Julie Pennington, Michael Crider, Kathleen Keller, Richard Keller, Richard Piatcheck, and Heidi Piatchek (the homeowners). The original appellees were the FDIC and three FSA lenders: North American Savings Bank, Heartland Bank, and ABM AMRO Mortgage Group, Inc. While this appeal was pending, we granted Michael Crider's motion to dismiss his claims against the FDIC.

The FSA lenders are mortgage lenders or brokers who extended credit or refinancing for the homeowners' purchases of residential property. In the course of

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[1] The Honorable Jean C. Hamilton, United States District Judge for the Eastern District of Missouri.

these transactions, the FSA lenders allegedly charged fees ranging from $100 to $250 in exchange for the preparation of mortgage documents. The homeowners allege that charging such fees constitutes the practice of law which Missouri reserves for licensed attorneys. They seek to enforce Missouri statutory and common law prohibiting the unauthorized practice of law, as well as the Missouri Merchandising Practices Act (MMPA).

The FSA lenders moved in the state court to dismiss the claims against them, arguing that the Missouri laws in question were preempted by 12 C.F.R. § 560.2, a federal regulation issued by the Office of Thrift Supervision (OTS) under the Home Owners' Loan Act (HOLA), 12 U.S.C. §§ 1461–1468. The state court agreed and granted the motion, concluding that the Missouri laws were preempted and therefore the claims failed to state causes of action.

The homeowners appealed to the Missouri Court of Appeals and while their appeal was pending, the FDIC was appointed receiver of Washington Mutual Bank, which was successor in interest to one of the FSA lenders, North American Mortgage Company (NAMCO). After its motions to be substituted for NAMCO and for a ninety day stay were granted under 12 U.S.C. § 1821(d), the FDIC removed all these claims to the United States District Court for the Eastern District of Missouri under § 1819(b)(2)(B).

The homeowners filed two motions in the federal district court. One was filed by Michael Crider who sought dismissal with prejudice of his claims against the FDIC pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure. The second was filed by the remaining homeowners who sought remand of their appeals to the Missouri Court of Appeals. The district court denied the first motion without prejudice but did not rule on the second. Instead it adopted the state court's order as its own, relying upon *Metro North State Bank v. Gaskin*, 34 F.3d 589 (8th Cir. 1994), and transferred the case to this court for appeal.

The homeowners renewed both motions before this court. On February 3, 2009, we granted Michael Crider's motion to dismiss pursuant to Rule 42(b) of the Federal Rules of Appellate Procedure. We ordered that the remaining homeowners' renewed motion for remand be considered with the substantive appeal.

II.

The homeowners argue that remand to the Missouri Court of Appeals is required by 28 U.S.C. §§ 1446(a), 1447(c) and that it is appropriate as a matter of judicial discretion under 28 U.S.C. § 1441(c) and *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). They also contend that the state court erred when it found their state law claims preempted by 12 C.F.R. § 560.2. We consider the renewed motion to remand before turning to the state

court preemption decision which was adopted by the district court.

A.

The homeowners first argue that remand is required because the February 3, 2009 dismissal of the claims against the FDIC deprived this court of subject matter jurisdiction over their state law claims against the remaining FSA lenders. Section 1447(c) requires that a case removed to federal court be remanded if at any time it is determined that subject matter jurisdiction is lacking. *Filla v. Norfolk Southern Ry. Co.*, 336 F.3d 806, 809 (8th Cir. 2003). Because we retain subject matter jurisdiction under 12 U.S.C. § 1819(b)(2)(A), however, remand is not required by § 1447(c).

We have not previously addressed the issue whether dismissal of the FDIC from a case predicated upon § 1819(b)(2) jurisdiction deprives a federal court of subject matter jurisdiction over remaining state law claims. We have however answered an analogous question in the negative: in *Kansas Pub. Emples. Retirement Sys. v. Reimer & Koger Assocs.*, 77 F.3d 1063, 1067 (8th Cir. 1996) (*KPERS*), we decided that dismissal of the Resolution Trust Corporation (RTC) from a case predicated upon 12 U.S.C. § 1441a(a)(11) jurisdiction did not divest federal subject matter jurisdiction over remaining state law claims for which no other basis of jurisdiction existed.

In *KPERS*, the plaintiff sued a bank and various individuals in state court, alleging violations of state law. *Id.* at 1065. After the RTC was substituted for the bank, it removed the entire case to federal court under § 1441a(a)(11), which provided the sole basis for federal subject matter jurisdiction. *Id.* at 1066. Subsequently the RTC was dismissed from the case, and the plaintiff moved to remand the state law claims brought against the individual defendants. *Id.* We affirmed the district court's refusal to remand, holding that "under [§ 1441a(a)(11)], once the RTC becomes a party to the case, the entire action is 'deemed to arise under the laws of the United States' and is within the original jurisdiction of the district court." *Id.* at 1067 (quoting § 1441a(a)(11)).

The language in § 1441a(a)(11), upon which that holding turned, tracks the wording found in § 1819(b)(2)(A), the statute which serves as the sole basis for federal subject matter jurisdiction in this case. *Compare* § 1441a(a)(11) ("[A]ny civil action, suit, or proceeding to which the Thrift Depositor Protection Oversight Board is a party shall be deemed to arise under the laws of the United States..."), *with* § 1819(b)(2)(A) ("[A]ll suits of a civil nature ... to which the [FDIC], in any capacity, is a party shall be deemed to arise under the laws of the United States."). Employment of such similar language in these two closely related statutes implies an intent by Congress that the two be interpreted in the same way. *See Atlantic Clear-*

ners & Dyers v. U.S., 286 U.S. 427, 433 (1932). The fact that the current versions of the two sections were enacted by the same act of Congress only buttresses that inference. *See* Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183, 216, 367. Moreover, the law concerning the RTC often informs its analogue in the FDIC context, and vice versa. *See, e.g., In re Collins Sec. Corp.*, 998 F.2d 551 (8th Cir. 1993).

We find our holding in *KPERS* persuasive here and conclude that all claims in a case to which the FDIC is a party have "arising under" federal subject matter jurisdiction. The subsequent dismissal of the claim against the FDIC did not defeat that jurisdiction or withdraw the court's jurisdiction over the state law claims filed against the other FSA lenders. Because we retain jurisdiction over the latter claims, section 1447(c) does not require that they be remanded to the Missouri Court of Appeals.

The homeowners next argue that because the FSA lenders did not join in the FDIC's motion to remove, the rule of unanimity requires remand. The rule of unanimity ordinarily requires that a case be remanded to the state court from which it was removed unless all defendants join in the motion for removal. 28 U.S.C. § 1446(a); *Horton v. Conklin*, 431 F.3d 602, 604 (8th Cir. 2005). This case was removed under § 1819(b)(2)(B), however, and that statute allows the FDIC to

remove any case to which it is a party from state to federal court within ninety days of its becoming a party. The FDIC's authority to remove under the statute is unilateral: it does not depend upon the consent of other defendants. To read onto § 1819(b)(2)(B) a requirement that all defendants join in the FDIC's motion for removal would undermine the broad removal power that the statute grants the FDIC. We conclude that the rule of unanimity does not limit the FDIC's unilateral power of removal under § 1819(b)(2)(B). *Accord Franklin Nat'l Bank Sec. Litig. v. Andersen*, 532 F.2d 842, 846 (2d Cir. 1976).

The homeowners argue in the alternative that remand is appropriate as a matter of judicial discretion under 28 U.S.C. § 1441(c). We question the applicability of § 1441(c) in this context since § 1819(b)(2)(B) provides jurisdiction over the state law claims. Even assuming that § 1441(c) were properly invoked here, the threshold for triggering our discretion to remand would not be met. When a case arising under federal law is removed from state court, § 1441(c) affords the federal court discretion to "remand all [otherwise non-removable] matters in which State law predominates." The question of predominance is informed by the precept that "[p]re-emption, the practical manifestation of the Supremacy Clause, is always a federal question." *Int'l Longshoreman's Ass'n v. Davis*, 476 U.S. 380, 388 (1986).

The homeowners urge us to exercise our statutory discretion to remand because Missouri law governing the practice of law allegedly predominates over the question of the preemptive effect of 12 C.F.R. § 560.2. With the exception of their renewed motion to remand, however, the sole issue on appeal is whether § 560.2 preempts the Missouri laws upon which the homeowners base their claims. And since "[p]reemption ... is always a federal question," Missouri law is not even at issue, let alone predominant. *Davis*, 476 U.S. at 388. Remand under § 1441(c) would be inappropriate because the requirement that state law predominate is unmet.

Finally the homeowners invoke *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), and ask us to abstain from reaching the preemption question in order to avoid impairing Missouri's ability to regulate the legal profession within its borders. "*Burford* abstention applies when a state has established a complex regulatory scheme supervised by state courts and serving important state interests, and when resolution of the case demands specialized knowledge and the application of complicated state laws." *Melahn v. Pennock Ins., Inc.*, 965 F.2d 1497, 1506 (8th Cir. 1992). That is not the situation here. Moreover, *Burford* abstention is appropriate only with respect to equitable claims. *Barzilay v. Barzilay*, 536 F.3d 844, 850–51 (8th Cir. 2008). Not only is there no indication that Missouri's prohibition on the unauthorized practice of law constitutes "a

complex regulatory scheme," *Melahn*, 965 F.2d at 1506, it appears from their first amended petition that plaintiffs have prayed for monetary relief alone. *See Barzilay*, 536 F.3d at 850–51.

For the foregoing reasons, we deny the homeowners' renewed motion to remand.

B.

The Missouri Circuit Court dismissed the homeowners' claims against the FSA lenders because it found the predicate state laws preempted by 12 C.F.R. § 560.2, a federal regulation issued by the Office of Thrift Supervision (OTS) under the authority of the Home Owners' Loan Act (HOLA) of 1933, 12 U.S.C. §§ 1461–1468. We review de novo the circuit court's dismissal on grounds of preemption. *Phipps v. FDIC*, 417 F.3d 1006, 1010 (8th Cir. 2005).

The parties do not contest that § 560.2 preempts conflicting state law, for state law that conflicts with federal law or that frustrates its effect is preempted. U.S. Const. art. VI, cl. 2. And "federal regulations have no less pre-emptive effect than federal statutes." *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982). The only question then is whether the state laws upon which the homeowners base their claims fall within the intended preemptive scope of § 560.2.

We begin with the regulation itself, which declares unequivocally the OTS' intent "[to] occupy the entire field of lending regulation for [FSAs]." § 560.2(a). Paragraph (a) of § 560.2 defines the extent to which state law is preempted: "[FSAs] may extend credit ... without regard to state laws purporting to regulate or otherwise affect their credit activities." *Id.* Paragraph (b) provides a nonexhaustive list of the types of state laws that are preempted by paragraph (a). § 560.2(b). Paragraph (c) provides the exception, sheltering from the regulation's preemptive scope state contract, commercial, real property, homestead, tort, and criminal law "to the extent that they only incidentally affect the lending operations of [FSAs] or are otherwise consistent with the purposes of paragraph (a)." § 560.2(c).

OTS interpretative guidelines specify the type of analysis courts should undertake in determining whether § 560.2 preempts a particular state law:

> [T]he first step will be to determine whether the type of law in question is listed in paragraph (b). If so, the analysis will end there; the law is preempted. If the law is not covered by paragraph (b), the next question is whether the law affects lending. If it does, then, in accordance with paragraph (a), the presumption arises that the law is preempted. This presumption can be reversed only if the law can clearly be shown to fit within the confines of paragraph (c). For

> these purposes, paragraph (c) is intended to be interpreted narrowly. Any doubt should be resolved in favor of preemption.

61 Fed. Reg. 50951-01, 50965–67 (Sept. 30, 1996). "[A]n agency's interpretation of its own regulation is entitled to deference unless plainly erroneous or inconsistent with the regulation." *United States v. Bailey*, 571 F.3d 791, 803 n.7 (8th Cir. 2009) (internal quotation marks omitted). Since OTS' interpretation is neither, it is due our deference.

Our analysis thus begins by determining whether the state laws in question fall within the scope of § 560.2(b). "If so, ... the law[s] [are] preempted." 61 Fed. Reg. at 50966. Paragraph (b) clarifies that the regulation preempts "state laws purporting to impose requirements regarding ... (5) [l]oan-related fees, including without limitation, initial charges." The parties contest the precise meaning of this language. The homeowners read the words "state laws purporting to impose requirements" to mean state laws that *on their face* impose requirements expressly upon lenders. Thus the argument goes, a law which makes no mention of lending necessarily falls outside the scope of the § 560.2(b) examples and is preempted only if § 560.2(a) requires that result, without regard to § 560.2(b). The FSA lenders read the regulation more broadly: a state law that does not expressly mention lending is never-

theless preempted if, *as applied*, the law is one described in § 560.2(b).

Although construction of the regulation is an issue of first impression in this circuit, other courts have confronted the issue. The Ninth Circuit, for example, has considered the preemptive effect of § 560.2 upon two California statutes prohibiting unfair advertising and unfair competition. *Silvas v. E*Trade Mortgage Corp.*, 514 F.3d 1001 (9th Cir. 2008). Neither statute purported on its face to impose requirements on lending. Because the statutes as applied were ones described in § 560.2(b), however, the court held them preempted. *Id.* at 1006. The Ninth Circuit framed the inquiry under § 560.2(b) similarly to the FSA lenders: that is, whether the state law, "*as applied*, is a type of state law listed under [§ 560.2(b)]." 514 F.3d at 1006 (emphasis added).[2] Holding that the generally applicable state laws met this test, the court expressly rejec-

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[2] The Ninth Circuit is not the only court to have found the "as applied" approach to be correct. *See, e.g., Boursiquot v. Citibank F.S.B.*, 323 F. Supp. 2d 350 (D. Conn. 2004) (§ 560.2 preempted claims under the Connecticut Unfair Trade Practices Act because, when applied to the generally applicable statute, the claims came within the scope of § 560.2(b)); *Moskowitz v. Wash. Mut. Bank*, 768 N.E.2d 262 (Ill. App. 2002) (claims under the Illinois Consumer Fraud and Deceptive Business Practices Act preempted for the same reason); *McCurry v. Chevy Chase Bank, F.S.B.*, 193 P.3d 155 (Wash. Ct. App. 2008) (claims under the Washington Consumer Protection Act preempted for the same reason).

ted any need to analyze the laws under § 560.2(c). *Id.* Although it failed to explain the reason for its conclusion that an "as applied" analysis was required, the court cited two OTS legal opinions which support its approach.

In a 1999 advisory opinion, the OTS had examined the same California statutes at issue in *Silvas*. *See* OTS Op. Chief Counsel (March 10, 1999). Acknowledging that the statutes did not on their face come within § 560.2(b), the agency proceeded to determine whether the § 560.2(c) exception to preemption applied. *Id.* at 12. The OTS did not analyze the statutes under the express terms of § 560.2(c), however, because they had been applied to impose requirements within the scope of § 560.2(b). *Id.* at 14–16. OTS thus adopted the approach later employed in *Silvas* and advocated by the FSA lenders here: a state law that *on its face* is not one described in § 560.2(b) may nevertheless be preempted if, *as applied*, it fits within § 560.2(b).

A 1996 OTS opinion supports this interpretation. Acknowledging that an Indiana deceptive practices statute was on its face not one described in § 560.2(b), the agency nevertheless examined whether it could escape preemption under § 560.2(c). OTS Op. Chief Counsel (December 24, 1996), at 9. The agency concluded in this case that the Indiana statute was not preempted because it fit within the § 560.2(c) preemption exception. Id. at 10. Unlike its later opinion, in 1996

the OTS did not analyze whether the statute as applied came within § 560.2(b). With no applications of the Indiana statute to inform its inquiry, the OTS could not analyze whether the statute as applied was one described in § 560.2(b), but had to rely on an abstract analysis.

The conclusion that § 560.2(b) contemplates an "as applied" analysis finds further support in an amicus curiae brief filed by the OTS in *Jenkins v. Concorde Acceptance Corp.*, 802 N.E. 2d 1270 (Ill. App. 2003)—a case factually similar to the case before the court. As here, the Jenkins plaintiffs sought to enforce against FSA lenders a state statute prohibiting the imposition of fees for the preparation of legal documents by non-lawyers. *Id.* at 1270. And as here, the statute was facially neutral. It did not mention lending and thus was not a type of law listed in § 560.2(b). The OTS maintained that the statute was nevertheless preempted because, as applied, it imposed requirements regarding loan related fees—making it one of the types of laws enumerated in § 560.2(b). Brief of the Office of Thrift Supervision as Amicus Curiae Supporting Defendant Cititbank, F.S.B. and Similarly Situated Defendants at 10, *Jenkins*, 802 N.E. 2d 1270 (No. 02-2738).

In sum, the OTS adheres to the analytic approach advocated by the FSA lenders. That approach is not only sensible, it is owed deference. *See Auer v. Robbins*,

519 U.S. 452, 461 (1997). We conclude that a state law that either on its face or as applied[3] imposes requirements regarding the examples listed in § 560.2(b) is preempted. A generally applicable state law that imposes no such requirements will not be preempted if, as applied, it "only incidentally affect[s] the lending operations of [FSAs] or [is] otherwise consistent with the purposes of [§ 560.2(a)]." § 560.2(c).

Two Missouri statutes are at issue here: § 484.020 of the Missouri Revised Statutes, which prohibits the unlicensed practice of the "law business"; and the MMPA, Mo. Rev. Stat. §§ 407.010 et seq., which prohibits fraudulent conduct in commerce. Neither statute purports on its face to impose requirements on lending. The pertinent inquiry is thus whether either statute,

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[3] The homeowners contend that a decision of the Seventh Circuit is at odds with this interpretation. It is not. In *In re Ocwen Loan Servicing, LLC Mortgage Servicing Litigation*, 491 F.3d 638 (7th Cir. 2007), the court held that several generally applicable state statutes were preempted by § 560.2(a) because, as applied, they fell within the § 560.2(b) illustrative examples. *See id.* at 645–48. It refused, however, to hold preempted traditional common law actions such as fraud, breach of contract, defamation, and slander of title. *Id.* Here, the homeowners have alleged a right to recover under the common law theory of money had and received, but unless the Missouri statutes survive the preemptive effect of § 560.2, they have no claim cognizable under that theory. *See Carpenter v. Countrywide Home Loans, Inc.*, 250 S.W.3d 697, 703 (Mo. 2008) ("Any person *engaged in the unauthorized practice of law* has no right to collect fees, and those who have been improperly charged these fees have the right to their return at common law under the theory of money had and received." (emphasis added)).

as applied, imposes requirements on lending such that it is a type of law enumerated in § 560.2(b).

The first amended petition alleges that the FSA lenders violated both Missouri statutes by charging the homeowners fees for legal document preparation by nonlawyers. Assuming the allegations are true, the charging of those fees would violate both statutes. *See Eisel v. Midwest BankCentre*, 230 S.W. 3d 335, 338 (Mo. 2007) (holding that such fees violate § 484.020); *Zmuda v. Chesterfield Valley Power Sports, Inc.*, 267 S.W.3d 712, 716 (Mo. Ct. App. 2008) (holding that such fees violate the MMPA). Thus, as applied, the statutes would impose requirements relating to document preparation fees in mortgage transactions. The question, then, is whether such fees fall within the scope of the examples listed in § 560.2(b).

According to the FSA lenders, the document preparation fees at issue constitute "[l]oan-related fees, including without limitation, initial charges," as enumerated in § 560.2(b)(5). We agree. We find highly informative the amicus curiae brief filed by the OTS in *Jenkins*—a case that, for purposes of the preemption analysis, was nearly factually identical to the case here. There, document preparation fees charged by FSAs were alleged to violate a generally applicable state statute prohibiting the imposition of fees for legal document preparation by nonlawyers. *See Jenkins*, 802 N.E. 2d 1270. The OTS stated its conclusion unequi-

vocally: "The document preparation charges at issue fall squarely within the[] illustrations [enumerated in § 560.2(b)]: they are initial charges and the task of preparing the documents is part of the process of originating the loan." Brief of the Office of Thrift Supervision as Amicus Curiae at 10, *Jenkins*, 802 N.E. 2d 1270 (No. 02-2738). The homeowners do not contest the OTS conclusion. Nor given the deference due it, do we. *See Auer*, 519 U.S. at 461.

Accordingly, we conclude that the Missouri statutes upon which the homeowners base their claims would impose requirements regarding "loan-related fees," as listed in § 560.2(b)(5). "[Because] the type of law[s] in question [are] listed in paragraph (b)[,] ... the an alysis ... end[s] there; the law[s] [are] preempted." 61 Fed. Reg. at 50966. Since the preemption question is thus resolved, further analysis under the § 560.2(c) exception is unnecessary. *Id.*

III.

We deny the homeowners' renewed motion to remand to the Missouri Court of Appeals because we retain arising under jurisdiction over the remaining state law claims lodged against the FSA lenders, the FDIC's removal power under 12 U.S.C. § 1891(b)(2)(B) is undiminished by the rule of unanimity, the requirement under 28 U.S.C. § 1441(c) that state law predominate is not met, and *Burford* abstention would be inappropriate. Furthermore, we conclude that the

Missouri laws upon which the homeowners base their claims are, as applied, types of laws identified in 12 C.F.R. § 560.2(b). As a result federal law preempts their enforcement here, and the homeowners' claims fail to state causes of action. We therefore affirm the dismissal of the homeowner claims on grounds of preemption.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

MICHAEL CASEY, *et al.*, Plaintiff(s), vs. ACCEL MORTGAGE SERVICES, INC., *et al.*, Defendant(s).

Case No. 4:08CV01701 JCH

December 30, 2008, Decided and Filed

ORDER

This matter is before the Court on Plaintiffs' Motion to Remand Claims Against Defendants North American Savings, Heartland Bank and ABN Amro (Doc. No. 11). This matter is fully briefed and ready for disposition.[1]

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[1] Defendants filed their Memorandum in Opposition to Plaintiffs' Motion to Remand ("Memorandum in Opposition"), filed on November 18, 2008 (Doc. No. 17), but Plaintiffs have not filed

The plaintiffs originally filed this action in the Circuit Court of St. Louis Count, Missouri in March 2002, Cause No. 02CC-01055. (Memorandum in Opposition, p. 3). The plaintiffs alleged that the lender defendants engaged in the unauthorized practice of law by charging fees for preparing certain loan documents. (*Id.*) In November 2002, the Circuit Court dismissed four of the named mortgage lenders (North American Savings Bank, F.S.B., North American Mortgage Company,[2] Heartland Bank, and ABN AMRO Mortgage Group, Inc.), which are federal savings banks. (*Id.*, pp. 3-4). In September 2007, the litigation against the other defendants concluded. The six plaintiffs in this action filed notices of appeal regarding the 2002 dismissal of their claims against the federal savings banks. (*Id.*, p. 4) The appeal was briefed before the Missouri Court of Appeals, Eastern District. (*Id.*) While the appeal was pending in the Missouri Appellate Court, the Office of Thrift Supervision (OTS) declared Washington Mutual Bank insolvent and appointed the Federal Deposit Insurance Corporation (FDIC) as receiver for Washington Mutual Bank. (*Id.*, p. 4). The FDIC, in its capacity as receiver for Washington Mutual Bank, successor-in-

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a reply.

[2] North American Mortgage Company was wholly owned by Washington Mutual Bank at all times relevant to these proceedings. (Memorandum in Opposition, p. 4).

interest to NAMCO, removed the appeal to this Court on November 6, 2008. (Doc. No. 1).

On November 10, 2008, Plaintiff Michael Crider moved to dismiss his appeal of the Circuit Court judgment entered in favor of North American Mortgage Company ("NAMCO"). (Doc. No. 10). In his Motion, Mr. Crider stated his desire to abandon his claims because "there is no reasonable likelihood of any recovery by Crider should he be successful in his appeal." (*Id.*, p. 2). On that same day, the remaining plaintiffs moved to remand this action to state appellate court. (Doc. No. 11).

The procedural history of this case is similar to that in *Metro North State Bank v. Gaskin*, 34 F.3d 589 (8th Cir. 1994). In that case, Metro North had been granted summary judgment in circuit court against the appellants. *Id.* at 591. The appellants appealed the case to the Missouri Court of Appeals. While the case was on appeal, Metro North was declared insolvent and the FDIC was appointed as receiver. *Id.* Upon removal to the United States District Court for the Western District of Missouri, the District Court reentered the judgment of the circuit court, granting summary judgments to the FDIC and the Missouri Bridge Bank against the appellants. *Id.* The appeal to the Eighth Circuit followed. *Id.*

Here, the parties agree that upon the FDIC being appointed as receiver, this case was properly removed

to federal court. *See* Memorandum in Opposition, p. 3; Brief in Support of Motion to Remand Claims Against Defendants North American Savings, Heartland Bank and ABN AMRO, Doc. No. 12, pp. 1-2. The main disagreement between the parties is this Court's role is with respect to plaintiff Crider's Motion to Dismiss and any collateral motions thereto. Plaintiffs believe that this Court has the right and/or ability to grant plaintiff Crider's Motion to Dismiss and, consequently, to grant the remaining plaintiffs' motion to remand. Defendants, in contrast, believe that Eighth Circuit law requires that the "district court [] takes the state court judgment as it finds it, prepares the record as required for appeal and forwards the case to a federal appellate court for review." *Metro North State Bank*, 34 F.3d at 591-92 (quoting *FDIC v. Meyerland Co.*, 960 F.2d 512, 520 (5th Cir. 1992), *cert. denied*, 122 L. Ed. 2d 123, 113 S. Ct. 967, 506 U.S. 1049 (1993)). Defendants do not believe that this District Court can grant Mr. Crider's Motion to Dismiss, but that Motion is solely within the province of the Eighth Circuit.

This Court agrees with the well-reasoned authority in *Metro North State Bank*. As evidenced by *Metro North*, when a case is pending in the state appellate court and then removed to the federal court, the District Court must enter the judgment of the circuit court and then transfer the case to the Eighth Circuit for continuation of the appeal. This Court hereby enters and adopts the judgment of the state circuit court and

transfers this case to the Eighth Circuit to address plaintiff Crider's Motion to Dismiss and the remaining issues on the appeal.

Accordingly,

IT IS HEREBY ORDERED that Plaintiffs' Motion to Remand Claims Against Defendants North American Savings, Heartland Bank and ABN Amro (Doc. No. 11) is DENIED without prejudice.

IT IS HEREBY FURTHER ORDERED that the judgment of the state court, St. Louis Count Circuit Court Case No. 02CC-01055, including the November 13, 2002 order granting Defendants North American Savings, Heartland Bank and ABN Amro 's Motion to Dismiss, be entered in and adopted by this Court.

IT IS HEREBY FURTHER ORDERED that the Clerk of this Court shall prepare the record in this case and transfer it to the Eighth Circuit for further disposition of the appeal.

Dated this 30th day of December, 2008.

/s/ Jean C. Hamilton

UNITED STATES DISTRICT JUDGE

IN THE CIRCUIT COURT
OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI

MICHAEL CASEY, *et al.*,
Plaintiff,

vs

CAUSE NO. 02CC-1055

ACCEL MORTGAGE SERVICES, INC, *et al.*,
Defendants.

DIVISION 19

ORDER OF COURT

Defendants, Allegiant Mortgage Company, Countrywide Home Loans, Inc., Chase Manhattan Mortgage Corporation, Heartland Bank, Midwest BankCentre, Mortgage Resources Incorporated, North American Savings Bank, F.S.B., Southwest Bank of St. Louis, Wells Fargo Home Mortgage, North American Mortgage Company, ABN Amro Mortgage Group, Inc, Cornerstone Mortgage, Inc, U.S. Bank National Association, have each filed some form of Motion to Dismiss. Within those various motions are some themes that are common and there are some themes that are exclusive to that Defendant's claim for relief. For purposes of judicial economy, the court will first address and rule upon those claims that are common to more than one Motion to Dismiss and then rule upon all other claims for relief.

I. UNLAWFUL PRACTICE OF LAW OR DOING LAW BUSINESS

a. Violation of Section 484.020, RSMo.

In their Petition, Plaintiffs allege that each Defendant is a lender engaged in the business of making or brokering home loans in the State of Missouri. They also allege that "Each of these home loans is secured by a deed of trust (or mortgage), and, in some cases, releases of deeds of trust, variable rate riders, a HUD-1 Settlement Statement, and other instruments and documents of legal significance". Each lender is alleged to charge a document preparation fee. Each Plaintiff alleges he or she was charged such a fee for document preparation. In Count I of the Petition, Plaintiffs allege that "Section 484.020, RSMo, prohibits any association or corporation, except a professional corporation organized pursuant to the provisions of Chapter 356, RSMo, from engaging in the practice of law or doing law business..." Plaintiffs allege that each of the defendants is prohibited from engaging in the practice of law or doing law business in the State of Missouri. Section 484.010, RSMo, defines "practice of law" as "the appearance of an advocate in a representative capacity or the drawing of papers, pleadings or documents or the performance of any act in such capacity in connection with proceedings pending or prospective before any court of record, commissioner, referee or any body, board, committee or commission constituted by law or

having authority to settle controversies." "Law business" is defined as "the advising or counseling for a valuable consideration of any person, firm, association, or corporation as to any secular law or the drawing or the procuring of or assisting in the drawing for a valuable consideration of any paper, document or instrument affecting or relating to secular rights or the doing of any act for a valuable consideration in a representative capacity, obtaining or tending to obtain or securing or tending to secure for any person, firm, association or corporation any property or property rights whatsoever." Although the allegations of Plaintiffs fail to allege that Defendants engaged in the practice of law as that term is defined in Section 484.010, RSMo, the allegations do state that Defendants were engaged in doing law business as defined and as prohibited by Section 484.020, RSMo. Therefore, Plaintiffs state a cause of action in Count I under the provisions of Section 484.020, RSMo.

b. Common Law Unlawful Practice of Law

Plaintiffs also claim that, aside from the provisions of Section 484.020, RSMo, they have alleged a cause of action for damages for unlawful practice of law under common law. The Missouri Supreme Court has stated that "the judicial department is necessarily the sole arbiter or what constitutes the practice of law." *Hulse v. Criger*, 247 S.W. 2d 855 (Mo.1952). Ultimately, it will be the Missouri Supreme Court that determines

what may or may not constitute the unlawful practice of law. Suffice it to say that the Supreme Court has already stated that although it is not the unlawful practice of law for a party to fill out business forms ancillary to the business of the person who did so, such actions must be taken without separate charge. *Hulse v. Criger, supra.* Therefore, this court finds that, until otherwise ruled by the Missouri Supreme Court, it appears that Plaintiffs have adequately alleged that Defendants have unlawfully practiced law.

The critical issue before this court is whether or not there is a civil action for unlawful practice of law independent of an action under Section 482.020, RSMo. *See, Jansen v. Guaranty Land Title Co,* 571 S.W. 2d 702 (Mo. App. E.D. 1978). That case cites to Rule 5.25. On the basis of that rule the court found that "Plaintiffs simply have no standing to prosecute; their interest in the purity of the legal profession is no greater than that of the public at large." *Jansen, supra,* 571 S.W. 2d at 706. On that basis the court found that the substantive suits based on the illegal practice of law were properly dismissed by the trial court. That rule does not appear to be the same Rule 5.25 that is presently in existence. However, Rule 5.29(a) provides "For the purpose of protecting the public, the chief disciplinary counsel shall have th power and is charged with the duty on behalf of the bar of investigating the unauthorized practice of law and of instituting and prosecuting appropriate suits, actions, or proceedings

against any parties and in any forums within or without the state of Missouri for the purpose." There is nothing within the Rules that appear to authorize independent civil actions to seek damages independent of actions under Section 484.020, RSMo. Therefore, the court finds that Plaintiffs lack standing to seek civil relief for the unlawful practice of law at common law. To the extent their pleadings seek to do so they should be dismissed. Wherefore, it is hereby ordered that the claims of all Plaintiffs against all Defendants are hereby dismissed for failure to state a cause of action to the extent the Plaintiffs seek to claim a cause of action under Count I for Unlawful Practice of Law at Common Law.

II. STATUTE OF LIMITATIONS AND STANDING

In some cases, the Plaintiffs clearly allege that the charging of a fee for document preparation, which they allege is the illegal practice of law giving rise to a cause of action under Section 484.020, RSMo, occurred more than two years prior to the filing of the petition. Section 484.020.2 provides that "Any person, ... or corporation who shall violate the foregoing prohibition of this section shall be guilty of a misdemeanor ... and shall be subject to be sued for treble the amount which shall have been paid him or it for any services rendered by the ... corporation paying the same within two years from the date the same shall have been paid." It further provides that "if within said time such ... per-

son ... shall neglect and fail to sue for or recover such treble amount, then the State of Missouri shall have the right to and shall sue for such treble amount and recover the same and upon the recovery thereof such treble amount shall be paid into the treasury of the state of Missouri." Contrary to the allegations of the Defendants in their Motions to Dismiss, this statute is not a statute of limitations. However, as pointed out in the oral arguments, this statute speaks to the issue of the standing of a Plaintiff to claim rights to recover under the provisions of Section 484.020 RSMo. This court finds that those Plaintiffs who failed to file suit within two years from the date the payments were made to the said Defendants, lack standing to seek relief under Section 484.020. That right vests exclusively with the State. Also, since the remedy afforded within Section 484.020, RSMo is a penalty, it is further covered by the three year statute of limitations under Section 516.130, RSMo.

The claims of Plaintiffs, Michael Casey and Julie Pennington, and Richard and Kathleen Keller against Defendant, North American Savings Bank, Plaintiff, Michael T. Crider, Jr. against Defendant, North American Mortgage Company, Plaintiffs, William and Patricia Craft against Defendant, Southwest Bank of St. Louis, Plaintiff, Mimi Fowler against Defendant, U.S. Bank National Association (as to the claim of 3/24/99), Plaintiff, Tim Lore against Defendant, Mortgage Resources, Plaintiff, Carl Makarewicz against

Defendant, Countrywide Home Loans, Inc, and Plaintiffs, Andrea and Michael McCann against Defendant, Allegiant Mortgage Company, were all filed more than two years after the named Defendants charged those Plaintiffs a document preparation fee. Therefore, those actions should be ordered dismissed for lack of standing by Plaintiffs to bring those actions.

Wherefore, it is hereby ordered that the above-listed claims under Count I of the First Amended Petition be dismissed for lack of standing under Section 484.020 RSMo.

III. MERCHANDISING PRACTICES ACT

a) SUFFICIENCY OF PLEADINGS

Plaintiffs have alleged in Count II of their Petition that they are entitled to recover damages pursuant to the Merchandising Practices Act, Section 407.010, RSMo. et seq. The court finds that the Petitioner sufficiently alleges a violation of that act by alleging "charging a Document Preparation Fee for the preparation of Documents necessary to effectuate financing transactions" as "a deception and an unfair practice."

b) EXCLUSIONS FROM LIABILITY UNDER THE MERCHANDISING PRACTICES ACT

Section 407.020.2(2) provides that the provisions of this act do not apply to "Any institution or company

that is under the direction and supervision of the director of the department of insurance, director of the division of credit unions, or director of the division of finance, unless the directors of such divisions specifically authorize the attorney general to implement the powers of this chapter or such powers are provided to either the attorney general or a private citizen by statute." Plaintiffs have acknowledged in their briefs that "State banks regulated by the Missouri Division of Finance are exempt from civil litigation or prosecution under the Merchandising Practice Act." In Count II, paragraph 79, Plaintiffs allege "This count is alleged against all defendants and all members of the Defendants' Class who are not under the direction and supervision of the division of finance. Plaintiffs do not specify which of the named Defendants need to respond to that allegation. It is inappropriate for Plaintiffs to require the court and the Defendants to have to guess whether or not this allegation is directed at a party defendant. Therefore, as to those Defendants who have alleged they are within this exception, this count needs to be dismissed to permit Plaintiffs to file a more specific pleading to permit the court to rule on which Defendants should remain subject to action on this count. Defendants, Southwest Bank of St. Louis, Midwest BankCentre, Mortgage Resources Incorporated, Cornerstone Mortgage, Inc., allege that they are under the direction and supervision of the Director of the Missouri Division of Finance. Wherefore, it is hereby

ordered that Count II of Plaintiffs' Petition against Defendants, Southwest Bank of St. Louis, Midwest BankCentre, Mortgage Resources Incorporated, Cornerstone Mortgage, Inc. be and are hereby dismissed without prejudice with leave to file an amended Petition which alleges which, if any, of such Defendants is not under the direction and supervision of the Director of the Missouri Division of Finance.

IV. PREEMPTION

Numerous Defendants have alleged that the causes of action by Plaintiffs have been preempted by various federal laws. The court finds no basis within any federal law to overcome the presumption against preemption except within that federal law applicable to Federal Savings Banks and their subsidiaries.

a. Federal Savings Banks

Pursuant to 12 U.S.C. 1463(a)(2) the Director of the Office of Thrift Supervision is authorized to "issue such regulations as the Director determines to be appropriate to carry out the responsibilities of the Director of the Office." Pursuant to 12 U.S.C. 1464 (a), "...the Director is authorized, under such regulations as the Director may prescribe–(1) to provide for the organization, incorporation, examination, operation and regulation of associations to be known as Federal Savings associations (including Federal savings banks), and..." Under 12 C.F.R. 560.2 (a), the Director, by regulation

has elected to occupy the field except for limited areas covered by (c) of the regulation, none of which appear to be relevant to this proceeding. Federal regulations such as 12 C.F.R. 560.2(a) have the same effect as federal statutes. *Fidelity Federal Savings and Loan Assn v. de la Cuesta*, 458 U.S. 141, 153, 73 L. Ed. 2d 664, 102 S. Ct. 3014 (1982). Regulation of fees related to financial transactions is within the clear intent of the regulations preempted. Therefore, this field has been preempted by federal law and Plaintiff fails to state a cause of action against those Defendants.

Defendants, Heartland Bank, North American Savings Bank, F.S.B., ABN AMRO Mortgage Group, Inc., and North American Mortgage Company, have each alleged that they are Federal Savings Association or subsidiaries under the exclusive regulatory authority of the Office of Thrift Supervision and subject to statutory authority of the Home Owners Loan Act, 12 U.S.C. 1462 et seq. Plaintiffs have not challenged these claims.

Wherefore, it is hereby ordered that the First Amended Petition of Plaintiffs, Richard and Kathleen Keller, against Defendant, Heartland Bank, Plaintiffs, Michael Casey and Julie Pennington and Richard and Kathleen Keller against Defendant, North American Savings Bank, F.S.B., Plaintiffs, Richard and Heidi Piatchek, against Defendant, ABN AMRO Mortgage Group, Inc, Plaintiff, Michael T. Crider, Jr. against

Defendant, North American Mortgage Company, be and are hereby dismissed for failure to state a cause of action as a result of federal preemption. Leave is hereby granted to file an amended Petition which alleges that any of these named defendants are not under the statutory authority of 12 U.S.C. 1462, et seq.

V. REMAINING CLAIMS OF DEFENDANTS

The Court finds no merit in any of the other claims for relief alleged in the Motions to Dismiss of the various Defendants.

Wherefore, it is hereby ordered that all additional and other grounds for relief, if any, requested by Defendant, Midwest BankCentre, on the claims of Plaintiff Patricia Eisel, by Defendant, Soutwest Bank of St. Louis on the claims of Plaintiffs William and Patricia Craft, by Defendant, Countrywide Home Loans, Inc. on the claims of Plaintiffs Cheryl Held and Carl Makarewicz, by Defendant Allegiant Mortgage Company, on the claim of Plaintiffs, Andrea and Michael McCann, by Defendant, U.S. Bank National Association, on the claim of Plaintiff Mimi Fowler, Defendant Chase Manhattan Mortgage Corporation on the claims of Plaintiffs, Timothy Hacker and Cathryn Senger and Ray and Constance Raley, Defendant, North American Savings Bank, F.S.B. on the claims of Plaintiffs, Michael Casey and Julie Pennington, and Richard and Kathleen Keller, by Defendant, Mortgage Resources Incorporated on the claim of Plaintiff, Tim

Lore, by Defendant, Cornerstone Mortgage, Inc., on the claims of Plaintiffs, Mimi Fowler and Richard and Jean M. Hynes, by Defendant, Wells Fargo Home Mortgage, Inc. on the claims of Plaintiffs, Michael Crider, Jr. and Cory L. and Jeremy W. Timblin, by Defendant, ABN AMRO Mortgage Group, on the claims of Plaintiffs, Richard and Heidi Piatchek, by Defendant, North American Mortgage Company, on the claim of Plaintiff, Michael T. Cirder, Jr. be and are hereby denied.

VI. ADDITIONAL ORDERS OF COURT

a) It is further ordered that Defendants against whom claims remain are granted 30 days from the date of this order to file answers to the Petitions.

b) This cause is hereby set for an additional scheduling conference for December 16, 2002, at 9 a.m.

SUPREME COURT OF MISSOURI

No. SC88167

CLARK E. EISEL and PATRICIA S. EISEL, individually and on behalf of all others similarly situated, Respondents, vs. MIDWEST BANKCENTRE, Appellant.

August 21, 2007, Decided

230 S.W.3d 335; 2007 Mo. LEXIS 134

En banc

PER CURIAM[1]

Overview

Midwest BankCentre charged Patricia and Clark Eisel a document preparation fee in connection with real estate financing transactions. The Eisels, appointed as class representatives for this suit, contend the fee violates section 484.020.1's ban on the unauthorized practice or doing of law.[2] The trial court agreed with the Eisels and awarded treble damages under section 484.020.2 as well as other damages and costs.

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[1] The Court of Appeals, Eastern District, transferred this case to this Court by an opinion authored by the Honorable Roy L. Richter. Mo. Const. article V, section 10. Parts of that opinion are *incorporated without further attribution*.

[2] All statutory references are to RSMo 2000, except as otherwise noted.

The document preparation fees at issue violate a plain reading of sections 484.010 and 484.020. Under the facts of this case, the statutes are not inconsistent with this Court's cases defining the practice of law. Midwest's constitutional challenge that section 484.020 fails to include a necessary mens rea was untimely. The judgment is affirmed.

Background

Midwest is a Missouri state-chartered bank with offices located in St. Louis County. In processing mortgage loans, Midwest employees complete pre-printed forms.[3] These forms place each loan in the proper format to be sold on the secondary mortgage market — a benefit to Midwest. Nevertheless, Midwest charges its borrowers a fee, referred to as a "document preparation fee" or a "processing fee," for preparing such forms.

Midwest made two mortgage loans to the Eisels in 2001. Midwest informed the Eisels of the document preparation fee, and the Eisels paid the fee on both loans. Patricia Eisel and other plaintiffs initiated this suit as a class action against a number of lending institutions in the St. Louis area alleging that such institu-

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[3] These forms include: a deed of trust and a promissory note, as well as various other documents, depending on the loan involved. There can be no question that the preparation of the deed of trust and the promissory note constitutes the practice of law. *In re First Escrow, Inc.*, 840 S.W.2d 839, 846 (Mo. banc 1992). The Court does not address any other specific documents.

tions were engaging in the unauthorized business of law through their loan processing procedures. The trial court granted class certification and certified several plaintiff subclasses, one of which included all persons who paid a fee to Midwest in connection with real estate financing during a named period of time. Patricia and Clark Eisel were appointed class representatives. Thereafter, the trial court severed the action involving multiple institutions into separate causes against each financial institution. This severance resulted in the current suit.

After a bench trial on stipulated facts, on August 16, 2005, the trial court entered judgment in favor of the Eisels on their claim that Midwest engaged in the unauthorized business of law in violation of section 484.020 and awarded treble damages pursuant to that section.

Midwest raised its initial challenge to the constitutionality of the treble damages clause of section 484.020 in its motion for new trial. The trial court overruled Midwest's motion based on the merits. Midwest appeals.[4]

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[4] The motions to dismiss this appeal for lack of jurisdiction are overruled. All issues and claims as to the parties involved — Midwest and Patricia and Clark Eisel, as representatives of the class—were disposed of at the trial level. Consequently, jurisdiction is proper.

Standard of review

Midwest challenges the judgment of the trial court below. Review of a court-tried case is governed by *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). However, when a case is submitted on stipulated facts, as here, this Court must determine "whether the trial court drew the proper legal conclusions from the facts stipulated." *Junior College Dist. of St. Louis v. City of St. Louis*, 149 S.W.3d 442, 446 (Mo. banc 2004). In making this determination, this Court accepts the evidence and inferences favorable to the prevailing party and disregards all contrary evidence. *General Motors Acceptance Corp. v. The Windsor Group, Inc.*, 103 S.W.3d 794, 796 (Mo. App. 2003). The Court reviews questions of law de novo. *Smith v. Shaw*, 159 S.W.3d 830, 832 (Mo. banc 2005).

Midwest violated section 484.020

In this case, the Eisels seek relief under the statutes. Section 484.010.2 provides (emphasis added):

> *The "law business" is hereby defined to be and is the* advising or counseling for a valuable consideration of any person, firm, association, or corporation as to any secular law or the drawing or the procuring of or *assisting in the drawing for a valuable consideration of any paper, document or instrument affecting or relating to secular rights* or the doing of any act for a valuable

consideration in a representative capacity, obtaining or tending to obtain or securing or tending to secure for any person, firm, association or corporation any property or property rights whatsoever.

Section 484.020 provides, in pertinent part:

1. No person shall engage in the practice of law or do law business, as defined in section 484.010, or both, unless he shall have been duly licensed therefor and while his license therefor is in full force and effect, nor shall any association, partnership, limited liability company or corporation, except a professional corporation organized pursuant to the provisions of chapter 356, RSMo, a limited liability company organized and registered pursuant to the provisions of chapter 347, RSMo, or a limited liability partnership organized or registered pursuant to the provisions of chapter 358, RSMo, engage in the practice of the law or do law business as defined in section 484.010, or both.

2. Any person, association, partnership, limited liability company or corporation who shall violate the foregoing prohibition of this section shall be guilty of a misdemeanor and upon conviction therefor shall be punished by a fine not exceeding one hundred dollars and costs of prosecution and shall be subject to be sued for

> treble the amount which shall have been paid him or it for any service rendered in violation hereof by the person, firm, association, partnership, limited liability company or corporation paying the same within two years from the date the same shall have been paid and if within said time such person, firm, association, partnership, limited liability company or corporation shall neglect and fail to sue for or recover such treble amount, then the state of Missouri shall have the right to and shall sue for such treble amount and recover the same and upon the recovery thereof such treble amount shall be paid into the treasury of the state of Missouri.

The parties stipulated that Midwest charged the Eisels a document preparation fee for preparing or completing various mortgage loan documents, including promissory notes and deeds of trust. They made similar stipulations as to other members of the class. In light of these stipulations, the statutory terms are met.

Control of the practice of law by this Court and the legislature

The judiciary is necessarily the sole arbiter of what constitutes the practice of law. Statutes may aid by providing machinery and criminal penalties but may not extend the privilege of practicing law to persons not admitted to practice by the judiciary. *Hulse v.*

Criger, 363 Mo. 26, 247 S.W.2d 855 (Mo. banc 1952). Such statutes are merely in aid of, and do not supersede or detract from, the power of the judiciary to define and control the practice of law. *Automobile Club of Mo. v. Hoffmeister*, 338 S.W.2d 348, 354-55 (Mo. App. 1960). Thus, one who may be in violation of the text of section 484.020 may defend a claim under the statute by showing a conflict between the text and activities that this Court has determined to be the authorized practice of law.[5]

Midwest fails to demonstrate that its activities constitute the authorized practice of law as determined by this Court. This Court has prohibited a company and its non-lawyer agents, servants, employees, and trust associates from drawing, preparing, or assisting in the preparation of trust workbooks, trusts, wills, and powers of attorney, for valuable consideration, for Missouri residents without the direct supervision of an independent licensed attorney selected by and representing those individuals. *In re Mid-America Living*

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[5] The legislature enacted section 484.025, effective August 28, 2005. It provides, "No bank or lending institution that makes residential loans and imposes a fee of less than two hundred dollars for completing residential loan documentation for loans made by that institution shall be deemed to be engaging in the unauthorized practice of law." This section may be applicable to preclude penalties under section 484.020, but does not affect this Court's ability to enjoin or otherwise punish such fees if they constitute the unauthorized practice of law. This case predates the effective date of section 484.025.

Trust Associates, Inc., 927 S.W.2d 855, 871 (Mo. banc 1996). Escrow companies may not charge a separate fee for document preparation or vary their customary charges for closing services based upon whether documents are to be prepared in the transaction. *In re First Escrow, Inc.*, 840 S.W.2d 839, 849 (Mo. banc 1992). Similarly, this Court noted that the charging of a separate additional charge tends to place emphasis on conveyancing and legal drafting as a business rather than on the business of being a real estate broker. *Hulse* at 863. With respect to Midwest, no conflict exists between section 484.020 and this Court's regulation of the practice of law.

Midwest's other defenses are unavailing

Midwest's argument regarding its personal interest defense is unpersuasive. Midwest asserts that because it maintained a personal interest in its transaction with the Eisels, it did not engage in the unauthorized business of law. Midwest misreads the statute. Possessing a financial stake in the outcome of a contract or loan does not defeat the fact that a non-lawyer charging a fee for document preparation constitutes the unauthorized business of law.

Midwest also contends that the trial court erred in granting judgment for the Eisels because the Eisels voluntarily paid the document preparation fees and, therefore, were not entitled to recover under the voluntary payment doctrine. This Court disagrees. The vol-

untary payment doctrine indicates that a person who voluntarily pays money with full knowledge of all the facts in the case, and in the absence of fraud and duress, cannot recover it back. *American Motorists Ins. Co. v. Shrock*, 447 S.W.2d 809, 812 (Mo. App. 1969). However, the voluntary payment doctrine is not applicable in all situations. Namely, the activities prohibited by section 484.020 are not subject to waiver, consent or lack of objection by the victim. *Bray v. Brooks*, 41 S.W.3d 7, 13 (Mo. App. 2001). The voluntary payment doctrine is a principle based on waiver and consent. Consequently, Midwest cannot benefit from this defense. To hold otherwise—that a customer, not a mortgage lender, would be burdened with the responsibility to recognize the unauthorized business of law and be barred from recovery due to having made a voluntary payment—would be illogical and inequitable.

Midwest's constitutional claim was not raised timely

Midwest requests plain error review because it failed to raise its constitutional challenge that section 484.020 fails to include a necessary mens rea until its motion for new trial. A constitutional question is waived unless raised in the trial court at the earliest opportunity. *Crittenton v. Reed*, 932 S.W.2d 403, 406 (Mo. banc 1996). Although Midwest correctly notes that this Court has granted plain error review under Rule 84.13(c) when a trial court's error has affected a sub-

stantial right and when the error resulted in manifest injustice or a miscarriage of justice, here, no error exists affecting substantial rights or resulting in manifest injustice. Midwest cites cases involving issues of free speech and voting rights. *See, e.g., Hanch v. K.F.C. National Management Corp.*, 615 S.W.2d 28 (Mo. banc 1981); *State ex rel. Petti v. Goodwin-Raftery*, 190 S.W.3d 501 (Mo. App. 2006). No similar rights are implicated here. The Court declines review.

Conclusion

The judgment is affirmed.

SUPREME COURT OF MISSOURI

No. SC88367

CYNTHIA CARPENTER, et al., Respondents, vs. COUNTRYWIDE HOME LOANS, INC., Appellant.

March 18, 2008, Decided

250 S.W.3d 697; 2008 Mo. LEXIS 27

En banc

Countrywide Home Loans, a mortgage company, prepares legal documents to complete mortgage loan transactions and charges its customers a document preparation fee for this service. Because of this activity, Countrywide was a named defendant in a class

action lawsuit against several mortgage lending institutions alleging that these companies were practicing law business without a license. The lawsuit was severed into subclasses against each respective lender.

The trial court found that this activity was the unauthorized practice of "law business"[1] and awarded plaintiffs damages. This Court, in *Eisel v. Midwest BankCentre*, 230 S.W.3d 335 (Mo. banc 2007), a case severed from the original action, confirmed that charging a fee for legal document preparation was the practice of law business and companies who did so were liable for treble damages pursuant to section 484.020.2.[2]

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[1] All statutory references are to RSMo 2000, unless otherwise noted.

Section 484.010.2 defines "law business" as

> ... the advising or counseling for a valuable consideration of any person, firm, association, or corporation as to any secular law or the drawing or the procuring of or assisting in the drawing for a valuable consideration of any paper, document or instrument affecting or relating to secular rights or the doing of any act for a valuable consideration in a representative capacity, obtaining or tending to obtain or securing or tending to secure for any person, firm, association or corporation any property or property rights whatsoever.

[2] Section 484.020.1 provides that no person shall engage in the practice of law or law business as defined in section 484.010 without a license. Section 484.020.2 states the penalty for the violation providing that

In this appeal, Countrywide argues that the provision awarding treble damages in section 484.020.2 is unconstitutional on due process grounds. Further, Countrywide argues that the trial court had no authority to award prejudgment interest or actual damages to the plaintiffs who did not meet the requirements of the statute.

The provision for awarding treble damages in section 484.020.2 is constitutional. The trial court judgment of treble damages to plaintiffs who paid the fee within two years of suit and actual damages and prejudgment interest to plaintiffs who paid three to five years prior to suit is affirmed. The award of prejudg-

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[a]ny person, association, partnership, limited liability company or corporation who shall violate the foregoing prohibition of this section shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding one hundred dollars and costs of prosecution and shall be subject to be sued for treble the amount which shall have been paid him or it for any service rendered in violation hereof by the person, firm, association, partnership, limited liability company or corporation paying the same within two years from the date the same shall have been paid and if within said time such person, firm, association, partnership, limited liability company or corporation shall neglect and fail to sue for or recover such treble amount, then the state of Missouri shall have the right to and shall sue for such treble amount and recover the same and upon the recovery thereof such treble amount shall be paid into the treasury of the state of Missouri.

ment interest for plaintiffs who recovered treble damages is reversed.

I.

Countrywide Home Loans is a mortgage company engaged in the business of making or brokering home loans in the state of Missouri. Each of these loans is secured by a deed of trust on the borrower's residence and is effected by various instruments and documents, including a promissory note and a deed of trust, executed by Countrywide employees. Countrywide charges its borrowers a fee for the completion of these documents, known as the "document preparation fee." The practice of completing the documents and charging a document preparation fee became the basis for this class action lawsuit filed in March 2002 against Countrywide Home Loans as well as several other mortgage lending institutions in the St. Louis area. The plaintiffs alleged that this activity constituted the unauthorized practice of law business prohibited by section 484.010 *et seq*. because the documents were not prepared by lawyers.

The court severed the class into subclasses against the respective lenders. The trial court, applying the five-year statute of limitations in section 516.120(4), defined the plaintiff subclass against Countrywide Home Loans as "all persons who paid a document preparation fee to Countrywide Home Loans, Inc., in connection with a real estate financing transaction in the

State of Missouri from April 18, 1997 to the present." The court appointed three plaintiffs as class representatives: Cynthia Carpenter and Andrew Cole, who paid the document preparation fee in 2002, and Cheryl Held, who paid the document preparation fee in 2001.

Plaintiffs, relying on the third amended petition filed in March 2003, argued that Countrywide's preparation of the documents was the unauthorized practice of law business pursuant to 484.010 *et seq.* and the activities were an unfair and deceptive practice under the merchandising practices act, section 407.010 *et seq.* Plaintiffs asked for treble damages pursuant to section 484.020.2 as well as actual damages and prejudgment interest under both counts. Countrywide filed an answer to the third amended petition in April 2003. In March 2006, Countrywide amended its answer to include the defense that the treble damage provision in section 484.020.2 was unconstitutional as it violates the due process clauses of the 14th Amendment and article I, section 10 of the Missouri Constitution.

A bench trial took place in May 2006. The trial court issued judgment in December 2006, finding that Countrywide engaged in the unauthorized law business and was liable for treble damages under the statute.[3] The court awarded actual damages, amount-

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[3] The trial court found in favor of Countrywide on the merchandising practices act claim.

ing to the recovery of the document preparation fee, to all class members who paid the fee between three and five years prior to suit. The court awarded treble damages pursuant to the statute to the class members who paid the fee within two years of the lawsuit. The trial court also awarded prejudgment interest on the actual damages for all class members.

Countrywide appealed the judgment to this Court. While Countrywide's appeal was pending, this Court decided *Eisel v. Midwest BankCentre*, 230 S.W.3d 335 (Mo. banc 2007). *Eisel* held that the preparation of the documents for a fee by non-lawyers was the unauthorized practice of law business and upheld the award of treble damages under section 484.020.2. Because Countrywide challenges the validity of the treble damages provision in section 484.020.2, this Court has exclusive jurisdiction pursuant to article V, section 3, of the Missouri Constitution.

II

Countrywide argues that section 484.020.2 violates the due process clauses of the 14th Amendment and article I, section 10 of the Missouri Constitution because the provision mandates an award of treble damages without proof of a culpable mental state.

a.

As a preliminary matter, plaintiffs argue that Countrywide's constitutional claim was waived because

it was not timely raised. The rule has long been established that to preserve constitutional questions for review on appeal, the constitutional issue must be raised in the trial court at the earliest opportunity, consistent with good pleading and orderly procedure. *See Call v. Heard*, 925 S.W.2d 840, 847 (Mo. banc 1996). This rule is necessary to prevent surprise to the opposing party and to allow the trial court the opportunity to identify and rule on the issue. *Id.* The rule allows parties to have a full and fair opportunity to litigate significant issues as early and as inexpensively in the litigation process as possible. The purpose of the rule is not to prevent parties from litigating issues that arise during the course of a lawsuit if there is no prejudice to the opposing party.

It is within the trial court's discretion to grant leave to amend pleadings, and this Court will not disturb the decision to grant leave to amend absent a showing the trial court obviously and palpably abused its discretion. *See Dye v. Div. of Child Support Enforcement, Dept. of Social Servs.*, 811 S.W.2d 355, 358 (Mo. banc 1991). Amendments should be liberally allowed and constitutional claims can be asserted by amendment to the initial pleadings. *See Anheuser-Busch Employees' Credit Union v. Davis*, 899 S.W.2d 868, 869 (Mo. banc 1995).

The plaintiffs alleged a violation of section 484.010 and asked for treble damages when the lawsuit was

first filed in 2002. Countrywide did not challenge the constitutionality of the statute until March 2006 in an amendment to its answer. However, the issue was raised prior to trial; plaintiffs had a full opportunity to respond; and the trial court had the opportunity to address the issue. There was no showing of prejudice. Although this defense should have been raised at an earlier date, the purposes of the rule were met, and the trial court did not abuse its discretion in considering this issue.

b.

Section 484.010 *et seq.* specifies certain activities as the unauthorized practice of law or law business and prohibits those without a license to engage in those activities. Section 484.020.2 provides the penalty for persons who violate the statute, providing that such persons

> ... shall be subject to be sued for treble the amount which shall have been paid him or it for any service rendered in violation hereof by the person, firm, association, partnership, limited liability company or corporation paying the same within two years from the date the same shall have been paid...

A statute is presumed to be constitutional and will not be invalidated unless it "clearly and undoubtedly violates some constitutional provision and palpably

affronts fundamental law embodied in the constitution." *Bd. of Educ. of City of St. Louis v. State*, 47 S.W.3d 366, 368-69 (Mo. banc 2001). Countrywide argues that section 484.020.2 is unconstitutional on due process grounds because treble damages are penal similar to punitive damages and, thus, to satisfy the requirements of due process, there must be a finding of a culpable mental state.

An award of treble damages, although penal in nature, does not require a finding of a culpable mental state. *See Greeson v. Ace Pipe Cleaning, Inc.*, 830 S.W.2d 444, 448-49 (Mo. App. 1992). The purpose of requiring a culpable mental state to award punitive damages is to ensure that defendants have fair notice that their conduct will subject them to a penalty as well as the severity of the penalty. *See BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996); *Werremeyer v. K.C. Auto Salvage Co.*, 134 S.W.3d 633, 635 (Mo. banc 2004). A statutory imposition of penal damages is different from jury imposed punitive damages to the extent that the statute defines the prohibited conduct and sets out the legislative prescribed penalty. Countrywide has not established that sections 484.010 and 484.020 were vague and did not provide it fair notice of the prescribed acts or the penalty associated with those acts.

Further, this Court has previously held in the analogous context of real estate brokers and escrow companies that the act of charging a separate fee for the completion of legal forms by non-lawyers constitutes the unauthorized practice of law business. *See In re First Escrow, Inc.*, 840 S.W.2d 839, 849 (Mo. banc 1992); *Hulse v. Criger*, 363 Mo. 26, 247 S.W.2d 855, 861 (Mo. banc 1952). In *In re First Escrow, Inc.*, this Court stated that escrow companies "may not charge a separate fee for document preparation, or vary their customary charges for closing services based upon whether documents are to be prepared in the transaction."[4] 840 S.W.2d at 849. Countrywide had clear and fair notice, both by statute and case law, that its activities constituted the unauthorized practice of law business and that this conduct would subject it to treble the amount of fees paid in exchange for those services.

III.

As a second point on appeal, Countrywide argues that the trial court erred in awarding damages to the plaintiff class who paid their document preparation fee more than two years prior to filing suit. Countrywide

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[4] In striking a workable balance between public convenience and protection, the Court allowed completion of certain standardized legal forms so long as the preparing party has a personal interest in the transaction and no separate fee is assessed. *See In re First Escrow, Inc.*, 840 S.W.2d at 846-47; *Hulse*, 247 S.W.2d at 860-63.

contends that the penalty for the unauthorized practice of law business in section 484.020.2 is limited to an award of treble damages for plaintiffs who paid the fee within two years of filing suit and offers no relief for the plaintiffs who paid fees more than two years prior to filing suit.

a.

Although this Court has the inherent and ultimate authority to supervise the practice of law by licensed attorneys and to prevent the practice of law by unauthorized persons, the legislature may aid the Court by providing penalties for the unauthorized practice of law. *See Strong v. Gilster Mary Lee Corp.*, 23 S.W.3d 234, 238-39 (Mo. App. 2000). The legislature provided such penalty for those engaged in the unauthorized practice of law business, in section 484.020.2, which allows customers who paid fees to those unauthorized to practice to recover treble the amount paid within two years from the date paid.

These statutes are merely in aid of and do not supersede or detract from the power of the judiciary to define and control the practice of law. *See Auto. Club of Mo. v. Hoffmeister*, 338 S.W.2d 348, 354-55 (Mo. App. 1960). In *Eisel v. Midwest BankCentre*, the Court found that no conflict existed between this section and the Court's regulation of the practice of law and awarded plaintiff's damages pursuant to this section. 230 S.W.3d 335, 339 (Mo. banc 2007).

However, this section does not extinguish any individual's common law remedies arising out of the unauthorized practice of law. Any person engaged in the unauthorized practice of law has no right to collect fees, and those who have been improperly charged these fees have the right to their return at common law under the theory of money had and received.[5] *See Lawson v. First Union Mortgage Co.*, 786 N.E.2d 279, 283-85 (Ind. Ct. App. 2003); *see also Investors Title Co., Inc. v. Hammonds*, 217 S.W.3d 288, 293-94 (Mo. banc 2007) (applying an action for money had and received "where the defendant has received or obtained possession of the money of the plaintiff, which, in equity and good conscience, he ought to pay over to the plaintiff").

b.

Countrywide argues that it is entitled to avoid refunding the unauthorized fees it collected by the voluntary payment doctrine. This doctrine provides that a person, who voluntarily pays money with full knowledge of the facts, in absence of fraud or duress, cannot

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[5] Because an action of money had and received is based on an implied contract of repayment, the statute of limitations is governed by section 516.120(1), providing that the cause of action must be brought within five years. *See Nat'l Sur. Co. v. Columbia Nat. Bank of Kansas City*, 348 Mo. 226, 153 S.W.2d 364, 368 (Mo. 1941). In this case, the plaintiff class was defined to include all plaintiffs who paid the document preparation fee within five years before suit. Therefore, the statute of limitations does not bar any of the plaintiffs that sought recovery in this case.

recover it back and is a recognized defense to an action for money had and received. *See Jurgensmeyer v. Boone Hosp. Ctr.*, 727 S.W.2d 441, 444 (Mo. App. 1987); *American Motorists Ins. Co. v. Shrock*, 447 S.W.2d 809, 812-13 (Mo. App. 1969). However, in *Eisel v. Midwest BankCentre*, this Court rejected the voluntary payment defense to the statutory recovery of treble damages for the unauthorized practice of law business. 230 S.W.3d 335, 339-40 (Mo. banc 2007). The Court found that the activities prohibited by the statute were "not subject to waiver, consent or lack of objection by the victim." *Id.* Therefore, the voluntary payment defense did not bar the plaintiffs' recovery, stating that to hold the consumer, not the mortgage lender, responsible for recognizing the unauthorized practice of law and precluding recovery because of a voluntary payment would be "illogical and inequitable." *Id.*

c.

Although plaintiffs have the option of pursuing recovery under both the statute and the common law action of money had and received, they may only obtain a single recovery. *See Ross v. Holton*, 640 S.W.2d 166, 173 (Mo. App. 1982). Therefore, plaintiffs who paid the fee are entitled to one of the two actions for relief. Plaintiffs who meet the requirements of section 484.020.2 can recover treble damages. Those who do not meet the requirements of the statute can recover the fee paid on the theory of money had and received

and interest upon that amount from the date of payment (*see* discussion at section IV). The trial court was correct to award the class of plaintiffs who paid the fee within two years of filing suit treble damages under the statute and the class of plaintiffs who paid the fee within three to five years of filing suit actual damages and interest.

IV.

Lastly, Countrywide argues that the trial court erred in awarding prejudgment interest because the trial court lacked any statutory or contractual authorization to award prejudgment interest. The issue of prejudgment interest must be analyzed separately regarding the class of individuals who paid the unauthorized fees between three and five years prior to filing suit and are entitled to recovery under the theory of money had and received and those who paid within two years of filing suit and are entitled to treble damages pursuant to section 484.020.2.

a.

Because the action of money had and received is based on equitable principles, the determination of whether to allow prejudgment interest resides in the discretion of the trial court. *See 21 West, Inc. v. Meadowgreen Trails, Inc.*, 913 S.W.2d 858, 871-72 (Mo. App. 1995); *Boyle v. Crimm*, 363 Mo. 731, 253 S.W.2d

149, 157 (Mo. 1952).[6] In this case, each class member will have a certain date that the unauthorized fee was charged and the amount of the fee is known. There is no reason why they would not be entitled to recover the time value of this sum. Countrywide was not authorized to charge this fee nor should it be allowed to retain the time value of the money collected. There was no abuse of discretion in awarding prejudgment interest to the class of plaintiffs who paid a document preparation fee within three to five years prior to filing suit.

b.

The trial court also awarded prejudgment interest to the plaintiffs who recovered treble damages under the statute, calculating interest based on the recovery of the document preparation fee prior to trebling. Section 484.020.2 is silent regarding prejudgment interest, expressly authorizing recovery only for "treble the amount which shall have been paid him."

Courts have taken different approaches to awarding interest in addition to the statutory multiple damage awards. Some courts, emphasizing the compensatory purpose of prejudgment interest, have allowed the party to recover interest on the amount of actual damages before they were doubled or trebled. *See Muehlstedt v.*

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[6] For a more general discussion of prejudgment interest, *see Akers v. City of Oak Grove*, 246 S.W.3d 916, 2008 Mo. LEXIS 26, *7 (Mo. banc 2008) (No. SC88581, decided March 18, 2008).

City of Lino Lakes, 473 N.W.2d 892, 896 (Minn. Ct. App. 1991); *DeWitt v. Medley*, 117 Idaho 744, 791 P.2d 1323, 1327 (Idaho Ct. App. 1990); *Andersen v. Edwards*, 625 P.2d 282, 289-90 (Alaska 1981). Other courts have looked to the legislative intent of the statute, typically precluding interest on any portion of the damages if the statute does not provide for interest and the statutory award satisfies the purpose of the statute. *See American Timber & Trading Co. v. First Nat'l Bank of Oregon*, 690 F.2d 781, 784-86 (9th Cir. 1982); *Ventoza v. Anderson*, 14 Wn. App. 882, 545 P.2d 1219, 1230 (Wash. Ct. App. 1976); *Rayonier, Inc. v. Polson*, 400 F.2d 909, 921-22 (9th Cir. 1968).[7]

The primary purpose of section 484.020.2 is to protect the public from the rendition of services deemed to require special fitness and training by those not possessing the required legal qualifications. *See Bray v. Brooks*, 41 S.W.3d 7, 13 (Mo. App. 2001). The penalty of treble damages adequately accomplishes this purpose. In addition, plaintiffs, who recover treble damages under the statute, receive substantially more than their actual damages and interest on that amount. The legislature provided a significant penalty in the express language of the statute and has more than

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[7] For more discussion of approaches to prejudgment interest awards on the recovery of multiple damages, see *Right to Prejudgment Interest on Punitive or Multiple Damage Awards*, 9 A.L.R. 5th 63 (1993).

compensated those who were harmed. This Court will not read into the statute an additional recovery of prejudgment interest.

It was an abuse of discretion to award plaintiffs who recovered treble damages pursuant to section 484.020.2 prejudgment interest.

V.

The award of prejudgment interest to plaintiffs who recovered treble damages is reversed. In all other respects, the judgment is affirmed.

William Ray Price, Jr., Judge

All concur.

(2)

No. 09-872

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

CORRECTED COPY

MICHAEL CASEY, *et al.*,

Petitioner,

v.

NORTH AMERICAN SAVINGS, F.S.B., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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February 22, 2010

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C 20002

QUESTION PRESENTED

Whether 12 C.F.R. § 560.2, which preempts state laws that purport to regulate "[l]oan-related fees" by federal savings banks, preempts state-law claims by residential mortgage borrowers asserting that it was unlawful for federal savings banks to charge a document preparation fee in connection with their loans.

PARTIES TO THE PROCEEDINGS

Pursuant to Rule 29.6, respondents state as follows:

Respondent ABN-AMRO Mortgage Group, Inc. has been merged into Citimortgage, Inc. The present ultimate parent of Citimortgage, Inc., is Citigroup, Inc. As a result of past transactions, Bank of America Corp., through various subsidiaries, retains an interest in this litigation. Citigroup, Inc., owns 10% or more of ABN-AMRO stock.

Respondent North American Savings Bank, F.S.B. is owned by NASB Financial, Inc. NASB Financial, Inc. owns 10% or more of North American Savings Bank, Inc. stock.

Respondent Heartland Bank is owned by Love Savings Holding Company. No public companies own more than 10% of Heartland Bank stock.

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BRIEF IN OPPOSITION

Petitioners obtained residential home loans from federally chartered savings associations. In connection with their loans, petitioners were charged a fully disclosed fee for the preparation of the documents necessary to close their loans. Missouri's rules regarding the practice of law do not prohibit non-lawyers from preparing these legal documents. Instead, Missouri law at the relevant time prohibited a non-lawyer who prepares such documents from charging a fee for doing so. *Eisel* v. *Midwest BankCentre*, 230 S.W.3d 335 (Mo. 2007) (per curiam).[1] Petitioners sued various federal savings banks, including respondents here, alleging that they had violated Missouri's rules regarding the unauthorized practice of law by charging their respective loan document preparation fees.

The Eighth Circuit affirmed a trial court ruling that petitioners' claims were preempted by the Home Owners' Loan Act, 12 U.S.C. § 1461 *et seq.* ("HOLA") and the Office of Thrift Supervision ("OTS") regulation implementing HOLA, 12 C.F.R. § 560.2. As this Court has observed, HOLA expresses Congress's intent to provide OTS broad authority to adopt regulations ensuring that federal savings banks "would be governed by what the [OTS]—not any particular State—deemed to be the 'best practices.'" *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 161-62 (1982). And OTS has

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[1] After the claims in this case were filed, the Missouri legislature amended the relevant Missouri statute to provide that a non-lawyer preparing the documents at issue here may charge a fee of up to $200 without engaging in the unauthorized practice of law. Mo. Rev. Stat. § 484.025. The fees at issue in this case were charged prior to the amendment of Missouri law.

expressly "occupie[d] the entire field" of regulating the lending activities of federal savings banks. 12 C.F.R. § 560.2(a). Indeed, among the illustrative examples of lending activities that OTS has determined should be subject to uniform federal regulation, and exempted from varying state regulatory regimes, are "[l]oan-related fees." *Id.* § 560.2(b)(5).

As petitioners' claims seek to use state law to challenge the lawfulness of a loan-related fee, their claims are clearly preempted by § 560.2(b)(5). Petitioners try to escape the unambiguous preemptive force of OTS's regulation by arguing that their claims are brought pursuant to Missouri laws that, *on their face*, do not concern themselves with lending. That is, the Missouri laws do not specifically say they are to be used to regulate lending activities. Petitioners' argument has been rejected by every federal appellate court to have considered it, and by the agency promulgating the federal regulations in question. A state law is preempted if, *as the petitioners seek to apply it*, that law would regulate the lending activities of a federal savings bank.

There is no split of authority. The law and regulation are being applied by the federal courts of appeals precisely as they are written, and in a manner that is fully consistent with the intent of both Congress and the OTS. Finally, there is no concern that the courts of appeals' proper interpretation of this particular regulation will have any impact on the preemptive effect of any other federal regulatory regime. Review by this Court is unwarranted. The petition should be denied.

COUNTERSTATEMENT OF THE CASE

This action, originally filed in Missouri state court, arises out of residential mortgage loans made by

respondent banks to petitioners in the state of Missouri. Respondents were federally chartered savings associations duly authorized to conduct business in the state of Missouri. Pet. App. A1-3. As such, respondents' lending activities at issue here are regulated by the OTS, which is a bureau of the Department of the Treasury. Petitioners are individual borrowers who received loans from the respondent banks. *Id.* at A2-3.

In connection with their loans, each petitioner was charged a fee for the preparation of documents necessary to close the loan. It is agreed that the document preparation fee was fully disclosed to each borrower. Each petitioner paid the fee without objection at the time his or her transaction closed.

Petitioners' complaint asserted that the lenders had, as a matter of Missouri law, engaged in the unauthorized practice of law by charging a fee for the preparation of documents in connection with their loans. Pet. at 2; Pet. App. A25-28. As originally filed, this action included claims asserted by numerous borrowers against numerous lenders, with only some of those lenders (including respondents here) having been federal savings banks. The Missouri state trial court dismissed the claims against the federal savings bank defendants on the ground that the claims were preempted by federal law, specifically HOLA and 12 C.F.R. § 560.2. Pet. App. A32-34.

While petitioners' appeal was pending before the Missouri Court of Appeals, one of the federal savings bank defendants, North American Mortgage Company, was placed into receivership by the FDIC. The FDIC was substituted into the action for North American Mortgage Company pursuant to 12 U.S.C. § 1821(d)(2)(A)(i) and Missouri Supreme Court Rule 52.13. Pet. App. A20. The FDIC then timely removed

the action to the federal district court for the Eastern District of Missouri pursuant to its authority under 12 U.S.C. § 1819(b)(2)(B). The district court adopted the state trial court's order as its own and transferred the case to the Eighth Circuit for review. *Id.* at A21-23. The borrower who had asserted a claim against North American Mortgage Company then dismissed his claim against the FDIC, leaving only the claims against respondents (North American Savings Bank, F.S.B., Heartland Bank, and ABN AMRO Mortgage Group, Inc.) for resolution by the court of appeals. *Id.* at A2.

As relevant here, the Eighth Circuit affirmed the dismissal on the ground that the claims against the federal savings banks are preempted. The court of appeals began by observing that 12 C.F.R. § 560.2 is a regulation promulgated by the OTS, and that OTS has provided interpretive guidelines for applying its regulation. Pet. App. A10-11. The first step in the process of applying the regulation is to examine whether the law being asserted by the plaintiff "fall[s] within the scope of § 560.2(b)," because if it does, the interpretive guidelines clearly state that the analysis ends and the law is preempted. *Id.* at A12. Section 560.2 provides that "state laws purporting to regulate .... [l]oan-related fees, including without limitation, initial charges" are preempted. 12 C.F.R. § 560.2(a), (b)(5); *see also* Pet. App. A12.

Petitioners' complaint did not challenge that the document preparation fees at issue here are "loan-related fees" within the meaning of the regulation. Pet. App. A18. Rather, they claimed that the word "purporting" in § 560.2(b) limits the preemptive scope of the regulation to laws that "*on their face* impose requirements expressly upon lenders." *Id.* at A12. None of the state laws upon which petitioners' claims

were based—the Missouri law business statute, Mo. Rev. Stat. § 484.020, the Missouri Merchandise Practices Act, *id.* § 407.010 *et seq.*, and Missouri's common law remedy for money had and received—on their face regulate loan-related fees. But it was undisputed that, as petitioners sought to apply those state laws, they would have the effect of regulating loan-related fees by federal savings banks. Thus the Eighth Circuit had to determine whether OTS's express identification of lending activities in subsection (b) of its regulation preempted state laws only to the extent they seek to regulate those activities on their face, or whether the regulation should be understood to apply to state laws that, as the plaintiffs seek to apply them, would have the effect of regulating those activities. Pet. App. A12-13.

The court of appeals "conclude[d] that a state law that either on its face or as applied imposes requirements regarding [the lending activities] listed in § 560.2(b) is preempted." Pet. App. A16 (footnote omitted). In so holding, the Eighth Circuit agreed with the analysis of the Ninth Circuit, which also had concluded that the as-applied approach was correct. *Id.* at A13 (discussing *Silvas* v. *E*Trade Mortgage Corp.*, 514 F.3d 1001 (9th Cir. 2008)). The Eighth Circuit also observed that the Seventh Circuit has likewise examined how state-law claims seek to apply state laws that do not specifically refer to lending activities in determining whether the claims are preempted under § 560.2(b). *Id.* at A16 n.3 (discussing *In re Ocwen Loan Servicing, LLC Mortgage Servicing Litig.*, 491 F.3d 638 (7th Cir. 2007)). The Eighth Circuit also relied on statements from OTS itself. Two opinion letters from the OTS Chief Counsel both indicate that the agency believes it is necessary to determine how a plaintiff seeks to apply

a particular state law before concluding whether the state law claim should be preempted under the regulation. *Id.* at A14-15 (discussing OTS Opinion P-99-3 (Mar. 10, 1999) and OTS Opinion (Dec. 24, 1996)). Finally, the Eighth Circuit noted that OTS had filed a brief in a case litigated in Illinois state court which concerned claims seeking to recover document preparation fees from federal savings banks under state law. In that brief, the OTS "maintained that the [Illinois] statute [which did not mention lending on its face] was nevertheless preempted because, as applied, it imposed requirements regarding loan related fees—making it one of the types of laws enumerated in § 560.2(b)." *Id.* at A15.

Because petitioners were seeking to use Missouri state law to "impose requirements relating to document preparation fees in mortgage transactions," the Eighth Circuit concluded that their claims were preempted by § 560.2(b). It therefore affirmed the judgment of the trial court.

REASONS FOR DENYING THE PETITION

1. Under HOLA, Congress explicitly delegated to OTS the authority to preempt state laws as they apply to the lending operations of federal savings associations. HOLA specifically provides that OTS is authorized "to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as Federal savings association." 12 U.S.C. § 1464(a)(1). This Court has found that the grant of preemptive authority is clear.

> The broad language of § [1464](a) expresses no limits on the [OTS]'s authority to regulate the lending practices of federal savings and loans....

> ... Congress plainly envisioned that federal savings and loans would be governed by what the [OTS]—not any particular State—deemed to be the "best practices." Thus, the statutory language suggests that Congress expressly contemplated, and approved, the [OTS's] promulgation of regulations superseding state law.

Fidelity Fed. Sav. & Loan Ass'n, 458 U.S. at 161-62 (citation omitted).

OTS has expressly preempted the entire field of lending regulations applicable to federal savings associations. 12 C.F.R. § 560.2(a). Preemption extends to any state law that impacts the lending activity of federal savings associations:

> Occupation of field.... To enhance safety and soundness and to enable federal savings associations to conduct their operations in accordance with best practices (by efficiently delivering low-cost credit to the public free from undue regulatory duplication and burden), OTS hereby occupies the entire field of lending regulation for federal savings associations. OTS intends to give federal savings associations maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme of regulation. Accordingly, federal savings associations may extend credit as authorized under federal law, including this part, without regard to state laws purporting to regulate or otherwise affect their credit activities .... For purposes of this section, "state law" includes any state statute, regulation, ruling, order or judicial decision.

Id. OTS has made clear that the purpose of its broad preemption regulation is to implement Congress's

intent of freeing federal savings associations from "a hodgepodge of conflicting and overlapping state lending requirements," so that they may "originate loans under a single set of uniform federal laws and regulations." 61 Fed. Reg. 50951, 50965 (Sept. 30, 1996).

OTS's preemptive regulation, 12 C.F.R. § 560.2, contains three subsections: (a), (b), and (c). Subsection (a) declares OTS's objective to occupy "the entire field of lending regulation" and its policy of establishing a "uniform federal scheme of regulation." Subsection (b) follows with an illustrative (but not comprehensive) list of clearly preempted lending activities. Subsection (c) concludes with a list of state laws that are not preempted "to the extent that they only incidentally affect the lending operations of Federal savings associations or are otherwise consistent with purposes of" the broad preemption and uniform regulatory policies of subsection (a).

The issue in this case concerns how to apply this regulation. And OTS has issued guidelines that provide a step-by-step method for doing so.

> When analyzing the status of state laws under § 560.2, the first step will be to determine whether the type of law in question is listed in paragraph (b). If so, the analysis will end there; the law is preempted. If the law is not covered by paragraph (b), the next question is whether the law affects lending. If it does, then, in accordance with paragraph (a), the presumption arises that the law is preempted. This presumption can be reversed only if the law can clearly be shown to fit within the confines of paragraph (c). For these purposes, paragraph (c) is intended to be construed narrowly. Any doubt should be resolved in favor of preemption.

61 Fed. Reg. at 50966-67. Petitioners have not disputed that OTS's interpretation of its own regulation is entitled to deference. *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997) (A federal agency's interpretation of its own regulations is entitled to deference "unless plainly erroneous or inconsistent with the regulation.") (internal quotation marks omitted).

One of the lending activities specifically identified in subsection (b) of the regulation is the charging of "[l]oan-related fees." 12 C.F.R. § 560.2(b)(5). As discussed above, in light of the undisputed fact that petitioners are seeking, in this lawsuit, to challenge the charging of a such a loan-related fee, the Eighth Circuit concluded that petitioners' claims fail at the first step of the preemption analysis. Pet. App. A18, (citing 12 C.F.R. § 560.2(b)(5)).[2] Contrary to petitioners' suggestion, there is nothing controversial about that ruling. It applies OTS's regulation in a manner consistent with every other court of appeals to have considered the question, and indeed, in precisely the manner that OTS itself has indicated it should be applied. And no other area of law has been cast into doubt by the Eighth Circuit's straight-forward application of this regulation.

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[2] Though petitioners believe that their claims are not preempted by § 560.2(b), they do not even try to explain how if their claims survived this "first step" in the preemption analysis, their claims could also survive the remainder of the analysis. They would still have to show that their claims only "incidentally" affect lending under § 560.2(c), which OTS has indicated should be interpreted as a "narrow" exception to preemption, and that courts should resolve doubts in favor of preemption. Because petitioners can offer no such explanation, this case presents a poor vehicle to consider the question presented.

2. Petitioners assert that the Eighth Circuit's decision deepens a split of authority among the circuits. Pet. 24-25. That is not so, as the Eighth Circuit itself recognized. Pet. App. A13-14, A16 n.3. To the contrary, the Eighth Circuit would have *created* a split authority where there is none, had it adopted petitioners' proposed interpretation of the regulation.

Petitioners claim that the Seventh Circuit's decision in *In re Ocwen Loan Servicing, LLC Mortgage Servicing Litigation*, 491 F.3d 638 (7th Cir. 2007), diverges from the Eighth Circuit's decision here because the Seventh Circuit concluded that certain claims brought under state deceptive practices acts may not be preempted. Pet. 25. But the Seventh Circuit's recognition that *some* claims against federal savings bank may not be preempted is beside the point. The Seventh Circuit's discussion of the "sprawling" pleading in *Ocwen*, 491 F.3d at 641, makes clear that some claims can be preempted even as other claims are not. What matters is *how* the Seventh Circuit distinguished between the two. Though numerous claims were asserted under various state deceptive trade practices acts, the Seventh Circuit did not determine preemption, as petitioners propose, by looking at each act *on its face* to see if any mention is made of regulating lending. Rather, it looked to how the complaint purported to *apply* those laws and stated that the applications seeking to regulate lending were preempted and those that assert more general grievances (like standard breach of contract or fraud) are not. *Id.* at 646-48. Indeed, when the Seventh Circuit considered whether a state unfair business practices act could be used to challenge fees charged by the lender, the

court stated that such a claim would be "clearly preempted" by § 560.2(b). *Id.* at 646-67.

In the respect that matters—examining a pleading to determine whether a state law, *as applied*, would impermissibly regulate the lending activities of a federal savings bank, *Ocwen* is perfectly in accord with the Ninth Circuit's decision in *Silvas* v. *E*Trade Mortgage Corp.*, 514 F.3d 1001 (9th Cir. 2008). The Ninth Circuit examined the regulations and concluded that its job was to determine whether a California law that on its face said nothing about lending was nonetheless impermissibly being used to regulate one of the lending activities identified in § 560.2(b). *See id.* at 1005-07 & nn.1, 3. The Eighth Circuit's ruling here takes precisely the same approach. Therefore, there is no split of authority.

3. The as-applied approach to preemption that all three courts of appeals to have considered the question have adopted is fully supported by the statements of OTS. Petitioners mischaracterize both the OTS's opinion letters and the holding of the Eighth Circuit in an effort to create space between the two. In fact, they reflect precisely the same understanding of how § 560.2 works.

Two OTS opinion letters discuss how to analyze whether state deceptive practices acts are preempted. In the first, issued in 1996, OTS merely considered whether Indiana's deceptive trade practices act is preempted *on its face* by § 560.2. OTS Opinion at 9-10 (Dec. 24, 1996). OTS determined that it is not, which means only that OTS recognizes that there may be circumstances where such a statute is asserted against a federal savings association in connection with activities that are not lending activities. But when the preemption question arises in the context of a particular claim, rather than a facial challenge to a

state law, OTS has made clear that the "preemption analysis requires consideration of the relationship between federal and state laws *as they are interpreted and applied, not merely as they are written.*" OTS Opinion P-99-3, at 12 (Mar. 10, 1999) (emphasis added). This is precisely what the Eighth Circuit did here, what the Seventh Circuit did in *Ocwen*, and what the Ninth Circuit did in *Silvas*.

Furthermore, the Eighth Circuit found "highly informative"—and Petitioners completely ignore—additional authority confirming that the OTS has ratified the as-applied approach. In *Jenkins* v. *Concorde Acceptance Corp.*, 802 N.E.2d 1270 (Ill. App. Ct. 2003), *aff'd*, 828 N.E.2d 1155 (Ill. 2005). the plaintiffs sought to enforce a state statute prohibiting non-lawyers from charging legal fees against a bank that charged for document preparation. *Id.* at 1274. The OTS filed an *amicus curiae* brief arguing that, even though the statute was facially neutral, as applied to the defendant bank it was preempted by § 560.2(b). Pet. App. A15.

Petitioners rightly point out that the OTS opinions do not support preemption of a state deceptive practices act "as a whole simply because it is being used in some cases in an attempt to regulate [l]enders." Pet. 23. But the Eighth Circuit did not declare that any Missouri law is preempted "as a whole" by § 560.2. The Eighth Circuit concluded that the petitioners were impermissibly trying to use Missouri law to regulate lenders, which is, as petitioners nearly admit, OTS's position as well.

OTS's as-applied approach, adopted by the various courts of appeals, is also not contrary to the plain language of the regulation. Petitioner claims that the word "purporting" in § 560.2(b) makes preemption contingent on whether the challenged state law "had

the purpose of regulating the credit activities of federal savings associations." Pet. 18. Such a reading of the regulation would not only impose serious practical burdens on courts, it would also work against OTS's own stated policy to enable federal savings associations to operate "under a single set of uniform federal laws and regulations." 61 Fed. Reg. at 50965. What matters from the point of view of federal policy is that lenders at federal savings associations know that there is one body of law to which they must adhere when engaged in lending activities. Whether as a matter of purpose or effect, a state law that imposes requirements on the lending activities of federal savings associations contravenes federal policy. Petitioners brought such a claim, and consistent with all the authority discussed above, it was properly determined to be preempted.

4. Petitioners' final gasp concerns the supposed far-reaching consequences of the Eighth Circuit's ruling. Pet. 27-30. That is nonsense. The Eighth Circuit's ruling interprets a particular regulation consistently with that of every other court of appeals to consider the issue and the agency that promulgated it, as well as its express policy. That interpretation is both sound and tied to the particulars of this regulatory regime. There is no disruption of settled law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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No 09-872

IN THE

Supreme Court of the United States

MICHAEL CASEY, *et al* ,

Petitioners,

v

NORTH AMERICAN SAVINGS, F S B , *et al* ,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY IN SUPPORT OF PETITION

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REPLY DISCUSSION

Pursuant to Supreme Court Rule 15 6, petitioners reply to respondents' opposition to the petition for writ of certiorari.

I. The state laws at issue only incidentally affect the lending operations of federal savings and loans.

Respondents contend that this case "presents a poor vehicle to consider the question presented," because, assertedly, petitioners have not shown that the state law at issue would "only incidentally affect lending operations" within the meaning of 12 C F R. § 560 2(c), and thus would be preempted regardless of the decision on the question presented *Brief in Opposition* at 9 n 2

Respondents' contention is in error, as the state laws at issue only incidentally affect respondents' lending operations because the impact is only incidental to the primary purpose of the state laws

The "incidentally affect[ing]" issue was not discussed in detail or raised as a question presented in the petition for certiorari because the Court of Appeals never reached the issue Having reached its erroneous holding concerning Section 560 2(b), the Eighth Circuit concluded that, "further analysis under the § 560 2(c) exception is unnecessary" *Casey v FDIC*, 583 F 3d 586, 596 (8th Cir 2009) [A–18]

Their responsive brief notwithstanding, respondents know full well petitioners' arguments about why the Missouri laws at issue only incidentally affect lending operations, because the issue was fully briefed below Since respondents have nevertheless raised the issue as a purported ground for denial of certiorari, this reply presents the general outline of the argument establishing that the Missouri laws at issue are not preempted because they only incidentally affect lending operations

Section 560 2(c) provides that state laws of general application, such as the law of contracts and commercial and tort laws, "are not preempted to the extent that they *only incidentally affect the lending operations* of Federal savings associations or are otherwise consistent with the purposes of paragraph (a) of this section " (emphasis added)

The phrase "only incidentally affect" is not defined in the regulation, or in the authorizing statute, and is only infrequently analyzed in the case law The case law is sufficient, however, to establish that laws, like the laws at issue here, designed to restrict the unauthorized practice of law and other deceptive acts and practices, that are applied to all types of persons and businesses, ranging from real estate brokers to escrow companies to recreational vehicle dealers to HVAC contractors, *see Petition* at 12–15, only incidentally affect

the lending operations of those federal savings associations that come within their scope

The Seventh Circuit in *In re Ocwen Loan Servicing, LLC, Mortgage Servicing Litig* , 491 F 3d 638 (7th Cir 2007), held that various state deceptive acts and practices ("DAP") statutes—statutes similar to the Missouri MPA here—are not generally preempted because such laws only incidentally affect lending operations *Id* at 644 Relying on both the regulatory language and a formal opinion of the OTS chief counsel, the Seventh Circuit stated

> The OTS has indicated, however, that it does not intend to preempt state laws that establish the basic norms that undergird commercial transactions The Indiana DAP falls within the category of traditional "contract and commercial" law under § 560 2(c)(1) *While the DAP may affect lending relationships, the impact on lending appears to be only incidental to the primary purpose of the statute—the regulation of the ethical practices of all businesses engaged in commerce in Indiana* There is no indication that the law is aimed at any state objective in conflict with the safe and sound regulation of federal savings associations, the best practices of thrift institutions in the

> United States, or any other federal objective identified in § 560 2(a) Accordingly, we conclude that the Indiana DAP is not preempted by federal law

Ocwen, 491 F 3d at 644 (ellipses and brackets in original deleted, emphasis added), quoting *Opinion of OTS Chief Counsel Preemption of State Laws Applicable to Credit Card Transactions* (Dec 24, 1996) at pp 9–10 [1]

Two district court decisions address the analysis to be used in determining whether a state law's impact on lending operations is only incidental "[T]he question is whether any impact on lending operations is incidental to the statute's primary purpose—not whether the impact of the statute on a bank's lending operation is 'incidental '" *Binetti v Washington Mutual Bank*, 446 F Supp 2d 217, 221 (S D N Y 2006) "[D]efendant's ability to conduct its banking business is no more than incidentally affected by the requirement that it comply with state laws that apply to all industries and individuals alike " *Baldanzi v WFC Holdings Corp* , 2008 U S Dist Lexis 95727, *8-*9 (S D N Y Nov 14, 2008) (holding that state-law claims for breach of contract and violation of state consumer protection act not preempted by the National Bank Act) *See also Gibson v World Savings & Loan Assn* , 103 Cal App 4th 1291,

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[1] As noted in the Petition, this OTS opinion is available on the internet at http //www ots treas gov/docs/5/56615 pdf

1302 (Cal App 4th Dist 2002) (when state law applies to anyone in business, and not just federal savings associations, the impact on savings associations is merely incidental)

Thus, the affect of the Missouri laws at issue here on the lending activities of respondents and other federal savings associations is only an incidental affect of those laws within the meaning of Section 560 2(c), and therefore the Missouri laws should be found not to be preempted should petitioners prevail on the question presented in the petition for certiorari

II. Respondents fail to address two of petitioners' key arguments, suggesting that they have no meritorious response.

Respondents offer no meaningful answer to the arguments asserted in Sections III and IV of the Discussion portion of the petition for certiorari

Section III demonstrates that the Eighth Circuit's interpretation of Section 560 2(b) effectively writes Section 560 2(c) out of the regulation That is because if, as the Eighth Circuit holds, a state law is always preempted if it affects lending operations as applied, then there will never be an opportunity in any case to consider whether such affect is merely incidental, as stated in the Section 560 2(c) exception to preemption Thus, if the Eighth Circuit is right, then Section 560 2(c) is superfluous *See Petition* at 26–27

Thus, the Eighth Circuit's interpretation of the regulation runs afoul of the well-established legal rule that courts should interpret statutes and regulations so as to give effect, whenever possible, to every clause and word used *Safeco Ins Co of America v Burr*, 551 U S 47, 59-60 (2007)

Respondents offer no response to this argument Indeed, it is not even mentioned in their brief in opposition to the petition

Section IV of the petition demonstrates the broad impact the Eighth Circuit's decision will have on other areas of the law if left uncorrected This impact results from the Eighth Circuit's failure to properly consider the meaning of the word "purporting," which appears in the phrases "purporting to regulate or otherwise affect" and "purporting to impose requirements regarding," as used in the regulation Section 560 2(a) & (b) Although the dictionary meaning of "purport", the root of "purporting", focuses on intentions and false appearances, the Eighth Circuit essentially gave the word no meaning at all in its analysis of the regulation

The petition demonstrated that this analysis, if followed in other legal arenas, such as ERISA, where preemption is statutorily defined in terms of "purports to regulate," the result would be to broadly expand the scope of federal preemption beyond its existing, well-established limits *See Petition* at 27–30

Despite the importance and length of this argument, respondents casually dismiss it as a "final gasp" and "nonsense," *Brief in Opposition* at 13, completely failing to address in any meaningful way the impact of the Eighth Circuit's analysis upon the present, established interpretation of these other statutes

Petitioners respectfully suggest that the reason why respondents do not address these important—and powerful—arguments is that there is no answer Petitioners' arguments are correct, and thus strongly support both the granting of the writ of certiorari and reversal of the judgment below

CONCLUSION

The petition for certiorari should be granted

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